

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL

75-7016  
75-7041

## United States Court of Appeals

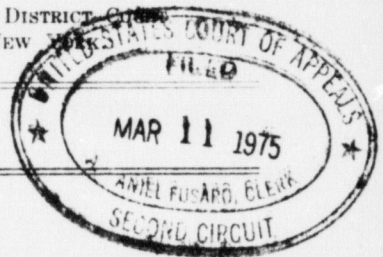
For the Second Circuit.

ROBERT ELLIOTT and SHIRLEY ELLIOTT,  
*Plaintiffs-Appellees,*  
*against*

MAGGIOLO CORPORATION, MAGGIOLO CONTRACTING CO., Inc.,  
MAGGIOLO FOUNDATION CORP., G & A CONTRACTING  
CORP. and RONNIE GORR,  
*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

### APPENDIX.



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# United States Court of Appeals

FOR THE SECOND CIRCUIT.

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ROBERT ELLIOTT and SHIRLEY ELLIOTT,

*Plaintiffs-Appellees,*

*against*

MAGGIOLO CORPORATION, MAGGIOLO CONTRACTING Co., Inc.,  
MAGGIOLO FOUNDATION CORP., G & A CONTRACTING CORP.  
and RONNIE GORR,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK.

## Docket Entries.

Date	Filings—Proceedings
11/ 6/72	Complaint filed Summons issued
11/21/72	Summons returned & filed/executed
12/26/72	Answer with jury demand filed (exc Gorr)
1/ 2/73	Defts' interrogatories to plttfs filed.
2/16/73	Deft's demand for jury trial filed.
2/16/73	Deft's demand for interrogatories filed.
5/ 8/73	Defts' answers to interrogatories filed.
7/31/73	Notice to take deposition of plttfs & deft Ronnie Gorr filed.
11/27/73	Notice of motion ret 12/7/73 for an order compelling the defts to answer certain interrogatories, etc. filed.
12/ 7/73	Before Mishler, Ch. J.—Case called & adj'd to 1/4/74.
12/ 8/73	Affidavit of Alan Mevis in opposition to plttfs' motion for additional answers to interrogatories filed.



*Docket Entries*

Date	Filings—Proceedings
1/ 4/74	Before Mishler, Ch. J.—Case called for hearing on plttfs' motion compelling defts to answer interrogatories. Motion argued. Motion granted. (see court's order on back of plttfs' additional interrogatories).
1/ 4/74	Additional plttfs' interrogatories filed.
1/ 4/74	By Mishler, Ch. J.—Order dtd 1/4/74 that defts answer interrogatories on or before 2/1/74 filed. (on back of document number eleven).
1/22/74	Defts' answers to interrogatories filed.
5/ 3/74	Before Mishler, Ch. J.—Case called—Marked read for trial—July 29, 1974 for trial
5/ 8/74	Three stenographer's transcripts dtd 5/3/74 <i>re</i> stipulation filed (so ordered by Judge Mishler).
5/ 9/74	Deft. Ronnie Gorr's amended answer and cross-complaint filed
5/15/74	Notice of Appearance filed.
5/16/74	Amended answer filed.
5/17/74	Stipulation allowing defts to file an amended answer filed
5/22/74	Notice of Motion, ret. June 7, 1974 filed <i>re</i> : for a change of venue
5/29/74	Answer to Amended Answer and Cross Complaint filed.
5/31/74	Affidavit of Irving Rosen in support of motion to transfer venue filed.
6/ 7/74	Before Mishler, Ch. J.—Case called & adj'd to 6/21/74.
6/18/74	Supplemental answers to interrogatories propounded by ptlff filed.
6/21/74	Before Mishler, Ch. J.—Case called & motion to change venue withdrawn.
7/26/74	Notice of motion to change venue ret 8/9/74 at 10 A.M. filed.

*Docket Entries*

Date	Filings—Proceedings
7/29/74	Before Mishler, Ch. J.—Case called—Adj'd to 8/9/74 for trial
7/30/74	Affirmation in opposition of Jerome Edelman filed.
8/ 9/74	Before Mishler, Ch. J.—Case called—Motion submitted (Motion for change of venue, etc.)
8/21/74	By Mishler, Ch. J. Memorandum of decision and order dtd 8/21/74 denying defts' motion to transfer action to U.S.D.C. S.D.N.Y. filed
11/22/74	Before Mishler, Ch. J.—Case called. Motion argued for an adj'd date for trial on application by the deft Maggiolo. Trial set down for 11/25/74 at 10 am.
11/25/74	Before Mishler, Ch. J.—Case called—Trial ordered and begun—Jurors selected and sworn—Motion by deft Maggiolo for a mistrial is denied—Motion by deft Gorr to dismiss the complaint is denied—Trial cont'd to 11/26/74
11/26/74	Deposition of D. Utegg filed. P.C. mailed to the attys.
11/26/74	Deposition of George Maggiolo on 7/27/73 filed.
11/26/74	Deposition of David Utegg on 11/24/74 filed.
11/26/74	Before Mishler, Ch. J.—Case called—Trial resumed—Trial cont'd to 11/27/74
11/27/74	Before Mishler, Ch. J.—Case called. Trial resumed. Trial cont'd to 12/2/74 at 10:30 AM
12/ 2/74	Before Mishler, Ch. J.—Case called—Trial resumed—Trial cont'd to 12/3/74
12/ 3/74	Before Mishler, Ch. J.—Case called. Trial cont'd to 12/4/74.
12/ 4/74	Before Mishler, Ch. J.—Case called—Trial resumed—Pltff rests—Deft Maggiolo motion to dismiss—Motion denied—Deft Gorr motion to dismiss complaint—Decision reserved—Trial cont'd to 12/5/74

Date	Filings—Proceedings
12/ 5/74	Before Mishler, Ch. J.—Case called—Trial resumed—Motion by deft Maggiolo for a mistrial is denied—Trial cont'd to 12/9/74
12/ 9/74	Before Mishler, Ch. J.—Case called—Trial resumed—Trial cont'd to 12/10/74
12/17/74	Affidavit of Sherman C. Bernhard filed.
12/10/74	Before Mishler, Ch. J.—Case called—Trial resumed—Motion by deft Maggiolo for a mistrial is denied—Trial cont'd to 12/11/74
12/11/74	Before Mishler, Ch. J.—Case called Trial resumed. Defts Maggiolo & Gorr rest. Both sides rest. Motion by defts to dismiss the complaint denied. Trial cont'd to 12/12/74 at 10:30 am.
12/12/74	Before Mishler, Ch. J.—Case called. Trial resumed. Court ruled on request to charge. Trial continued to 12/13/74 at 10 A.M.
12/13/74	By Mishler, Ch. J.—Order of sustenance dtd 12/12/74 filed.
12/13/74	Before Mishler, Ch. J.—Case called. Trial resumed. Court charges jury. Jury returned and rendered a verdict in favor of plttf Robert Elliott in the sum of \$350,000 and \$28,000 as to the plttf Shirley Elliott, and against the defts. Jury polled. Jury discharged. Entry of judgment is stayed until 12/20/74 to give deft time to make motion. Trial concluded.
12/16/74	By Mishler, Ch. J.—Order of sustenance dtd 12/13/74 filed.
12/17/74	Notice of Motion, ret. 12/20/74 filed <i>re:</i> for a new trial
12/17/74	Stenographer's transcript of Dec 2, 9, 10 & 12, 1974 filed.

Date	Filings—Proceedings
12/17/74	Affidavit of Sherman Bernhard filed.
12/18/74	Stenographer's transcript dtd 12/13/74 filed.
12/19/74	Stenographer's transcripts dtd Nov. 25, 26, 27, Dec. 3, 4, 5 & 11, 1974.
12/19/74	Affidavit of Jerome Edelman and memorandum of law in opposition to defts motion for a new trial filed.
12/20/74	By Mishler, J.—Memorandum and Order dtd 12/20/74 denying defts' motion for a new trial filed. (p/c to attys)
12/20/74	By Mishler, J.—Memorandum and Order dtd 12/20/74 entering judgment in favor of debt Gorr and against Maggiolo filed. (p/c to atty)
12/20/74	Judgment dtd 12/20/74 in favor of plttfs Robert Elliot and Shirley Elliot and against defts Maggiolo Corp, Maggiolo Contracting Co. Maggiolo Foundation Corp. G & A Contracting and Ronnie Gorr. Ordered the debt Ronnie Gorr have judgment against debt Maggiolo Contracting Co. and Maggiolo Foundation Corp & G. & A Contracting dismissing the cross-claim against the said debt Ronnie Gorr and for such sums as the said Ronnie Gorr shall pay on account of the judgment in favor of the plttfs herein filed. (p/c mailed.)
12/20/74	Before Mishler, Ch. J.—Case called. Defts motion for a new trial argued. Motion denied.
12/20/74	Affidavit filed.
12/27/74	Notice of Appeal filed. Copy sent to C of A. JN



**Complaint.**

UNITED STATES DISTRICT COURT,  
EASTERN DISTRICT OF NEW YORK.

---

ROBERT ELLIOTT and SHIRLEY ELLIOTT,  
*Plaintiffs,*  
*against*

MAGGIOLO CORPORATION, MAGGIOLO CONTRACTING Co., Inc.,  
MAGGIOLO FOUNDATION CORP., G & A CONTRACTING CORP.  
and RONNIE GORR,  
*Defendants.*

---

Plaintiffs, complaining of the defendants herein by  
their attorneys, respectfully allege:

AS AND FOR A FIRST CAUSE OF ACTION ON BEHALF OF  
PLAINTIFF ROBERT ELLIOTT

FIRST: That the plaintiffs reside in Brockton, Mass.  
and are citizens of the State of Massachusetts.

SECOND: That this action is predicated upon diver-  
sity of citizenship, and is an action for an amount in  
excess of \$10,000.00, and this Court has jurisdiction over  
the subject matter of this action.

THIRD: Upon information and belief, that at all times  
hereinafter mentioned, the defendant Maggiolo Corpora-  
tion is a citizen of the State of New York, being a domes-  
tic corporation duly organized and existing under and  
by virtue of the laws of the State of New York.

FOURTH: Upon information and belief, that at all  
times hereinafter mentioned, the defendant Maggiolo  
Contracting Co., Inc., is a citizen of the State of New

*Complaint*

York, being a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York.

FIFTH: Upon information and belief, that at all times hereinafter mentioned, the defendant Maggiolo Foundation Corp. is a citizen of the State of New York, being a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York.

SIXTH: Upon information and belief, that at all times hereinafter mentioned, the defendant G & A Contracting Corp. is a citizen of the State of New York, being a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York.

SEVENTH: Upon information and belief, that at all times hereinafter mentioned, defendant Ronnie Gorr was the owner of the motor truck hereinafter referred to.

EIGHTH: Upon information and belief, that at all times hereinafter mentioned, the defendant Maggiolo Corporation was the owner of the motor truck hereinafter referred to.

NINTH: Upon information and belief, that at all times hereinafter mentioned, the defendant Maggiolo Contracting Co. was the owner of the motor truck hereinafter referred to.

TENTH: Upon information and belief, that at all times hereinafter mentioned, the defendant Maggiolo Foundation Corp. was the owner of the motor truck hereinafter referred to.

ELEVENTH: Upon information and belief, that at all times hereinafter mentioned, the defendant G & A Contracting Corp. was the owner of the motor truck hereinafter referred to.

*Complaint*

TWELFTH: Upon information and belief, that at all times hereinafter mentioned, the defendant Maggiolo Corporation maintained, managed, operated and controlled the aforesaid motor vehicle.

THIRTEENTH: Upon information and belief, that at all times hereinafter mentioned, the defendant Maggiolo Contracting Co., Inc. maintained, managed, operated and controlled the aforesaid motor vehicle.

FOURTEENTH: Upon information and belief, that at all times hereinafter mentioned, the defendant Maggiolo Foundation Corp. maintained, managed, operated and controlled the aforesaid motor vehicle.

FIFTEENTH: Upon information and belief, that at all times hereinafter mentioned, the defendant G & A Contracting Corp. maintained, managed, operated and controlled the aforesaid motor vehicle.

SIXTEENTH: Upon information and belief, that the defendant Maggiolo Corporation had a contract with the Woodbridge Urban Renewal Agency of Woodbridge, New York in connection with the demolition and/or construction of structures in Woodbridge, N. Y.

SEVENTEENTH: Upon information and belief, that the defendant Maggiolo Contracting Co. had a contract with the Woodbridge Urban Renewal Agency of Woodbridge, New York in connection with the demolition and/or construction of structures in Woodbridge, N. Y.

EIGHTEENTH: Upon information and belief, that the defendant Maggiolo Foundation Corp. had a contract with the Woodbridge Urban Renewal Agency of Woodbridge, New York in connection with the demolition and/or construction of structures in Woodbridge, N. Y.

NINETEENTH: Upon information and belief, that the defendant G & A Contracting Corp. had a contract with the Woodbridge Urban Renewal Agency of Wood-

*Complaint*

bridge, New York in connection with the demolition and/or construction of structures in Woodbridge, N. Y.

TWENTIETH: Upon information and belief, in performance of the aforesaid contract, the defendant Maggiolo Corporation employed the truck herein referred to for the transportation of debris including lumber from the aforesaid location.

TWENTY-FIRST: Upon information and belief, in performance of the aforesaid contract, the defendant Maggiolo Contracting Co., Inc. employed the truck herein referred to for the transportation of debris including lumber from the aforesaid location.

TWENTY-SECOND: Upon information and belief, in performance of the aforesaid contract, the defendant Maggiolo Foundation Corp. employed the truck herein referred to for the transportation of debris including lumber from the aforesaid location.

TWENTY-THIRD: Upon information and belief, in performance of the aforesaid contract, the defendant G & A Contracting Corp. employed the truck herein referred to for the transportation of debris including lumber from the aforesaid location.

TWENTY-FOURTH: That at all times hereinafter mentioned the plaintiff was employed by the Village of Woodbridge, Woodbridge, New York.

TWENTY-FIFTH: That on the 24th day of April, 1972 the plaintiff was situated on Glen Wild Road, in the Town of Woodbridge, County of Sullivan, State of New York.

TWENTY-SIXTH: That on the 24th day of April, 1972 the motor vehicle herein described was traveling on Glen Wild Road in the Town of Woodbridge, County of Sullivan, State of New York.



*Complaint*

TWENTY-SEVENTH: That on the 24th day of April, 1972 a piece of lumber fell from the aforesaid motor vehicle and came in contact with the plaintiff, Robert Elliott, on Glen Wild Road in the Town of Woodbridge, County of Sullivan, State of New York.

TWENTY-EIGHTH: That as a result of the foregoing, the plaintiff Robert Elliott sustained personal injuries.

TWENTY-NINTH: That the negligence and carelessness of the defendants consisted of the following amongst other things: in the negligent maintenance, management, operation and control of the defendants' aforesaid motor vehicle; in failing to keep and maintain said motor vehicle and the contents thereof under reasonable, proper, safe and lawful control at the said time and place; in improperly and carelessly loading the aforesaid truck; in negligently and carelessly causing, allowing, permitting and/or suffering a board or piece of lumber from the aforesaid truck to fall from said truck and come in contact with the plaintiff, in failing to set up proper safeguards and barriers; in failing to make proper and adequate inspections; in failing to take proper and adequate steps to prevent the occurrence as hereinafter set forth; in failing to keep a proper lookout and watch; in failing to use the accepted modes, practices and customs in such cases made and provided for; and in being negligent and careless in the premises.

THIRTIETH: That solely as a result of the defendants' negligence as aforesaid, this plaintiff, Robert Elliott, was rendered sick, sore, lame and disabled, and was caused to sustain severe and serious personal injuries, and upon information and belief, some of these injuries are of a permanent and/or lasting nature; that the said plaintiff was confined to hospital, bed and home as a result thereof; has been caused to obtain medical aid and

*Complaint*

attention in an endeavor to cure or alleviate the injuries sustained and, upon information and belief, will be compelled to do so in the future, was totally disabled and necessarily unable to attend to his usual affairs and duties.

THIRTY-FIRST: That as a result of the foregoing, this plaintiff has been damaged in the sum of Nine Hundred Thousand (\$900,000.00) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF PLAINTIFF SHIRLEY ELLIOTT

THIRTY-SECOND: Plaintiff Shirley Elliott repeats, reiterates and realleges each and every allegation contained in paragraphs numbered First through Thirtieth of this complaint with the same force and effect as if the same were herein set forth at length.

THIRTY-THIRD: That at all times hereinafter mentioned the plaintiff Shirley Elliott was and still is the wife of the plaintiff Robert Elliott.

THIRTY-FOURTH: That solely as a result of the defendants' negligence as aforesaid, this plaintiff was deprived of the love, services, society and companionship of her husband, the plaintiff Robert Elliott during the period of his disability.

THIRTY-FIFTH: That as a result of the foregoing, this plaintiff has been damaged in the sum of One Hundred Thousand (\$100,000.00) Dollars.

WHEREFORE, plaintiff Robert Elliott demands judgment against the defendants on the first cause of action in the sum of Nine Hundred Thousand (\$900,000.00) Dollars.

*Complaint*

and plaintiff Shirley Elliott demands judgment against the defendants on the second cause of action in the sum of One Hundred Thousand (\$100,000.00) Dollars, together with the costs and disbursements of this action.

SIDNEY ORSECK and  
EDELMAN, BERGER, PETERS & KOSHEL  
Attorneys for Plaintiffs  
Office & P. O. Address  
16 Court Street  
Brooklyn, N. Y. 11201

Defendants Demand Trial by Jury.

**Answer of Maggiolo.****UNITED STATES DISTRICT COURT,****EASTERN DISTRICT OF NEW YORK.**

The defendants, Maggiolo Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp. and G & A Contracting Corp., by their attorney John J. Langan, Esq., answering the complaint of the plaintiffs herein: respectfully alleges upon information and belief:

FIRST: Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs designated: First, Second, Third, Fourth, Fifth, Sixth, Seventh, Twenty-fourth, Twenty-fifth, Thirty-third.

SECOND: Denies each and every allegation contained in the paragraphs designated: Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-first, Thirty-fourth, Thirty-fifth.

THIRD: Repeats above denials for paragraph designated: "First" through "Thirtieth" which is recited in paragraph "Thirty-second" of the complaint.

AS AND FOR A SEPARATE AND COMPLETE DEFENSE TO THE ALLEGED CAUSE OF ACTION, THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

FOURTH: That any injury or injuries sustained by the plaintiff herein were not caused by any negligence or carelessness on the part of the defendant, his servants, agents or employees, but were caused solely by the negligence and carelessness on the part of the plaintiff or some third party or parties over whom the defendants



*Answer of Maggiolo*

Maggiolo Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp., and G & A Contracting Corp., had no control contributed to and caused the injuries complained of.

WHEREFORE, the defendants demand judgment dismissing the complaint herein; together with the costs and disbursements of this action.

Dated: Brooklyn, New York  
Dec. 21, 1972

JOHN J. LANGAN, Esq.  
Attorney for Defts.  
175 Remsen St.  
Brooklyn, New York, 11201

To:

Edelman, Berger, Peters & Koshel, Esqs.  
Attorneys for plaintiffs  
16 Court St. Bklyn. NYC

Clerk of the Eastern District  
United States Courthouse

Our File # HO 373 AL 02323  
ls

**Amended Answer of Maggiolo.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

The defendants, Maggiolo Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp., and G & A Contracting Corp., by their attorney John J. Langan, Esq., answering the complaint of the plaintiffs herein, respectfully allege upon information and belief:

FIRST: Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs designated: First, Second, Third, Fourth, Fifth, Sixth, Seventh, Twenty-fourth, Twenty-fifth, Thirty-third.

SECOND: Denies each and every allegation contained in the paragraphs designated: Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-first, Thirty-fourth, Thirty-fifth.

THIRD: Repeats above denials for paragraph designated: "First" through "Thirtieth" which is recited in paragraph "Thirty-second" of the complaint.

AS AND FOR A SEPARATE AND COMPLETE DEFENSE TO THE ALLEGED CAUSE OF ACTION, THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

FOURTH: That any injury or injuries sustained by the plaintiff herein were not caused by any negligence or carelessness on the part of the defendant, his servants, agents or employees, but were caused solely by the negligence and carelessness on the part of the plaintiff or some third party or parties over whom the defendant Maggiolo

*Amended Answer of Maggiolo*

Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp. and G & A Contracting Corp. had no control, contributed to and caused the injuries complained of.

AS AND FOR A CROSS-CLAIM AGAINST CO-DEFENDANT RONNIE GORR, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

FIFTH: That if plaintiffs sustained the injuries and damages in the manner and at the time and place alleged, and if it is found that the answering defendants are liable to plaintiffs herein, all of which is specifically denied, then said answering defendants, on the basis of apportionment of responsibility for the alleged occurrence, are entitled to indemnification from and judgment over against the aforementioned co-defendant, for all or part of any verdict or judgment that plaintiffs may recover against said answering defendants.

That by reason of this action, said answering defendants have been and will be put to costs and expenses including attorneys fees.

WHEREFORE, defendants Maggiolo Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp. and G & A Contracting Corp. demand judgment dismissing plaintiffs' complaint against them, together with the costs and disbursements of this action, and further demands that in the event said answering defendants are found liable to plaintiffs herein, then said answering defendants, on the basis of apportionment of responsibility, have judgment over against the aforementioned co-defendant for all or part of the verdict or judgment that plaintiffs may recover against said answering defend-

*Amended Answer of Maggiolo*

ants, together with the costs and disbursements of this action, and for any expenses incurred by it in the defense thereof, including attorneys fees.

Dated: Brooklyn, New York  
May 14, 1974

JOHN J. LANGAN  
Attorney for Defendants Maggiolo  
Office & P. O. Address  
175 Remsen Street  
Brooklyn, New York 11201  
(212) 858-9200

By: SERGI & FETELL, of Counsel  
Office & P. O. Address  
44 Court Street  
Brooklyn, New York 11201

To:

Edelman, Burger, Peters & Koshell, Esqs.  
Attorneys for Plaintiffs  
16 Court Street  
Brooklyn, New York

Dominick J. Cornella, Esq.  
Attorney for Defendant Gorr  
160 Broadway  
New York, New York



**Answer of Gorr.**

## UNITED STATES DISTRICT COURT,

## EASTERN DISTRICT OF NEW YORK.

The defendant Ronnie Gorr by his attorney Dominic J. Cornella, answering the complaint of the plaintiffs herein:

## ANSWERING A FIRST CAUSE OF ACTION

FIRST: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in those paragraphs of the complaint designated "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Eighth", "Ninth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-first", "Twenty-second", "Twenty-third", "Twenty-fourth", "Twenty-fifth", "Twenty-sixth", "Twenty-Seventh" and "Twenty-eighth".

SECOND: Upon information and belief denies each and every allegation contained in those paragraphs of the complaint designated "Seventh", "Twenty-ninth", "Thirtieth" and "Thirty-first".

## ANSWERING A SECOND CAUSE OF ACTION

THIRD: Except as hereinbefore admitted or otherwise pleaded this answering defendant denies each and every allegation repeated and realleged in that paragraph of the complaint designated "Thirty-second".

FOURTH: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in those paragraphs of the complaint designated "Thirty-third", "Thirty-fourth" and "Thirty-fifth".

*Answer of Gorr*

AS AND FOR AN AFFIRMATIVE DEFENSE TO THE FIRST AND  
SECOND CAUSES OF ACTION

FIFTH: Upon information and belief, whatever injuries and damages alleged to have been sustained by plaintiffs, at the time and place alleged were the result of and caused by the contributory negligence of plaintiff Robert Elliott, and not the result of any negligence by this answering defendant.

DOMINIC J. CORNELLA, P. C.  
Attorney for Defendant  
Ronnie Gorr  
Office & P. O. Address  
160 Broadway  
New York, New York 10038

**Judgment.**

UNITED STATES DISTRICT COURT,

For The

EASTERN DISTRICT OF NEW YORK.

Civil Action File No. 72-C-1518

This action came on for trial before the Court and a jury, Honorable Jacob Mishler, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the plaintiffs Robert Elliott and Shirley Elliott and against the defendants Maggiolo Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp., G & A Contracting Corp. and Ronnie Gorr,

It is ORDERED AND ADJUDGED that the plaintiff Robert Elliott recover of the defendants the sum of \$350,000 and the plaintiff Shirley Elliott the sum of \$28,000, with interest from Dec. 13, 19 , together with costs when taxed, and it is further

ORDERED AND ADJUDGED that defendant Ronnie Gorr have judgment against the defendants Maggiolo Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp., and G & A Contracting Corp., dismissing the cross-claim against the said defendant Ronnie Gorr and for such sums as the said Ronnie Gorr shall pay on account of the judgment in favor of the plaintiffs herein.

Dated at Brooklyn, New York, this 20th day of December, 1974.

LEWIS ORGEL  
Clerk of Court

By: ILLEGIBLE  
Deputy Clerk

**Notice of Appeal of Defendants Maggiolo and G & A  
Contracting Corp.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that defendants, Maggiolo Corporation, Maggiolo Contracting Co., Inc., Maggiolo Foundation Corp. and G & A Contracting Corp., hereby appeal to the Court of Appeals, Second Circuit, from so much of a judgment of this Court entered in the office of the Clerk of said Court on the 20th day of December, 1974, which grants judgment to plaintiff, Robert Elliott, in the sum of \$350,000 and grants plaintiff, Shirley Elliott, judgment in the sum of \$28,000, together with interest and costs, and the said defendants do hereby appeal from that portion thereof, on questions of law and fact.

Dated: Brooklyn, New York  
December 20th, 1974

Yours, etc.,

SERGI & FETELL  
Attorneys for defendants,  
Maggiolo and G & A

By: ILLEGIBLE  
A Member of the Firm  
Office & P. O. Address  
44 Court Street  
Brooklyn, New York 11201

To:

Edelman, Berger, Peters & Koshel, Esqs.  
Attorneys for Plaintiffs  
16 Court Street  
Brooklyn, New York

Dominick J. Cornella, Esq.  
Attorney for Defendant, Gorr  
160 Broadway  
New York, New York



**Notice of Appeal by Gorr.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice, that the defendant, Ronnie Gorr, hereby appeals to the Court of Appeals, Second Circuit, from so much of a judgment of this Court entered in the office of the Clerk of said Court on the 20th day of December, 1974, which grants judgment to plaintiff, Robert Elliott, in the sum of \$350,000. and grants plaintiff, Shirley Elliott, judgment in the sum of \$28,000. together with interest and costs, and the said defendant does hereby appeal from that portion thereof, on questions of law and fact.

Dated: New York, New York  
January 6, 1975

Yours, etc.,

DOMINIC J. CORNELLA, P. C.  
Attorney for Defendant  
Ronnie Gorr  
Office & P. O. Address  
160 Broadway  
New York, New York 10038

**Defendants Maggiolo's Pretrial Motion for Adjournment  
of Trial.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

State of New York,  
County of Kings,           ss:

BENJAMIN J. SERGI, being duly sworn, deposes and says:

I am a member of the firm of Sergi & Fetell, Esqs., Trial Counsel to John J. Langan, Esq., attorney for the Maggiolo defendants.

This affidavit is submitted in support of the extraordinary application of said defendant for dual relief.

1. A reasonable adjournment of the trial of this action.

2. An order quashing the deposition of David Utegg, a witness herein and a direction by the Court that said David Utegg's testimony be taken only in open Court in the presence of the Court and jury.

The matters contained in this affidavit are based on an extensive investigation to which deponent has been privy from the outset.

This is an action to recover damages for personal injuries allegedly sustained by one Robert Elliott. Mr. Elliott alleges that on April 24, 1972, he was employed by the Village of Woodridge, Woodridge, N. Y., in the Public Works Department. At the time of his alleged accident, defendant Maggiolo was engaged in certain demolition work in and around the Village of Woodridge. Mr. Elliott claims that on April 24, 1972, while he was cleaning out a catch basin on Glenwild Road, Woodridge, N. Y., a truck operated by one David Utegg, on behalf of Maggiolo, drove past him and that a piece of lumber fell off the truck, struck him in the face, causing partial blindness and deafness, *inter alia*.

*Defendants Maggiolo's Pretrial Motion for Adjournment  
of Trial*

Investigation conducted on behalf of Maggiolo revealed that no truck owned or operated by Maggiolo was in the vicinity of the site of the alleged accident.

As late as May of 1974, Maggiolo was still in the dark with respect to the details of the plaintiff's claims.

On May 3, 1974, at a conference in the Chambers of Judge Mishler, an order for further discovery was signed by the Court.

On July 11, 1974, all depositions were conducted at this Courthouse, including that of plaintiff Robert Elliott and David Utegg, as a witness.

Mr. Utegg testified that he was the driver of a truck owned by co-defendant Gorr and operated on behalf of co-defendant Maggiolo. Utegg's testimony, in essence, confirmed the plaintiff's version of the accident, to wit, that he, David Utegg, was driving a truck down Glenwild Road and that he saw Elliott alongside a catch basin. With that information at hand, a very extensive investigation was conducted by our office on behalf of co-defendant Maggiolo.

Deponent, as an attorney and officer of this Court, hereby certifies to this Court that it appears that a fraud has been or will be perpetrated in this action.

We have learned of the fact and confirmed the fact that David Utegg gave testimony at the deposition on July 11, 1974 under pressure in return for promises made to him. It appears that Mr. Utegg is blind and that he was promised that in return for his testimony, a compensation claim will be asserted on his behalf to establish causal relationship between his blindness and an employment situation.

We have further learned that other individuals have been importuned to give testimony favorable to the plaintiff herein. It has come to our attention that David Utegg was told that if he would give testimony favorable to plaintiff at the deposition, his presence in Court would not be required. We have in our possession what we believe to

*Defendants Maggiolo's Pretrial Motion for Adjournment  
of Trial*

be valid evidence that if David Utegg is called upon in Court, under oath, to give testimony, he will recant the testimony given at the deposition.

This case has been on the Ready Hold Calendar of Judge Mishler for some time now, subject to his Honor's Calendar.

Within the past few days it has come to our attention that David Utegg was originally scheduled to have eye surgery performed in Florida and that there was a change in his plans and that he is presently scheduled for eye surgery on November 20, 1974 in Scranton, Pennsylvania.

It is our very carefully considered opinion that the timing of the scheduled surgery bears a direct relationship to the time that this matter is to be reached for trial before Judge Mishler. To the best of our knowledge and belief, this surgery was not of an emergency nature.

In the interests of justice and by virtue of the extraordinary powers vested in this Court, it is most respectfully urged that the trial of this action, now scheduled for November 25, 1974, be adjourned to a time when David Utegg will be physically available to come into Court to testify in person.

We further respectfully urge that this Honorable Court direct that under these extraordinary circumstances here presented and in the interests of justice that the *de bene esse* deposition of David Utegg be quashed and that the Court further direct that his testimony be taken only in open Court before the Court and jury, or in the alternative that the Court direct the issuance of a subpoena pursuant to FRCP 45 (e) (1).

Deponent certifies that this application is made in good faith, with full realization of the consequences of the statements made herein, and is not made for the purpose of delay.

(Sworn to by Benjamin J. Sergi, November 21, 1974.)



**Defendants Maggiolo's Motion for New Trial.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that upon the annexed affidavit of Lester E. Fetell, Esq., sworn to the 14th day of December, 1974, upon the trial transcript herein, and upon all oral applications previously made to the court during the course of the trial herein, the undersigned will move this court at the Chambers of Hon. Jacob Mishler, U.S.D.J., U. S. Courthouse, Cadman Plaza East, Brooklyn, New York, on the 18th day of December 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an

1. ORDER pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure for a new trial of the issues herein, upon the detailed grounds set forth in the annexed affidavit.

2. For such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York  
December 14, 1974

SERGI & FETELL

Counsel to JOHN J. LANGAN, Esq.

Attorneys for defendants  
Maggiolo

By: Illegible

A Member of the Firm  
44 Court Street

Brooklyn, New York 11201

875-8808

*Defendants Maggiolo's Motion for New Trial*

To:

Edelman, Berger, Peters & Koshel, Esqs.

Attorneys for plaintiffs

16 Court Street

Brooklyn, New York 11201

Dominic J. Cornella, Esq.

Attorney for defendants Gorr

160 Broadway

New York, N. Y.

**Affidavit of Lester Fetell in Support of Motion for New Trial.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

State of New York,  
County of Kings, ss:

LESTER E. FETELL, being duly sworn deposes and says:

I am a member of the firm of Sergi & Fetell, Esqs. trial counsel to John J. Langan, Esq. attorney for all of the named Maggiolo defendants. I was associated trial counsel herein, and as such am personally familiar with the matters contained in this affidavit, which is submitted in support of said defendants' motion pursuant to FRCP Rule 50(b) for an order granting a new trial, on the following grounds:

1. Conduct of plaintiffs' trial counsel, which created such prejudice as to have denied the defendant an opportunity to present the issues herein to the jury in an atmosphere which was fair, calm, reasonable and within the appropriate rules governing fair trial by jury.

2. The trial court erred in its rulings vis a vis the admissibility of evidence in connection with the use of the depositions of David Utegg, and the admissibility of evidence tendered to destroy the credibility of said witness, and the exclusion of certain testimony of a witness Harold Utegg and Brian DuBois, which rulings deprived these defendants of a fair and reasonable opportunity to present to the jury full evidence in support of defendant's contentions.

*Affidavit of Lester Fetell in Support of Motion for New Trial*

1. CONDUCT OF COUNSEL:

It is not necessary to catalogue the detailed acts of plaintiff's counsel which were improper, inflammatory, contumacious of the rulings of the trial judge, patently tactical beyond the bounds of fair presentation of evidence, prejudicial, patently designed to create a climate of prejudice in the courtroom, etc. etc. The acts of trial counsel for plaintiff were beyond the pale, so much so that the trial judge was driven to the ultimate limits of his judicial endurance; so much so that defense counsel perforce was compelled, in the interests of justice to demand a mistrial on several occasions.

The issue here presented is to determine whether those acts, too numerous to catalogue, which are emblazoned on this trial record, deprived defendants of a fair trial. Defense counsel, as well as the trial court, were fully cognizant of the pragmatics of the calendar problems which beset this court, we fully appreciated the fact that with each passing day of trial time the cost to the government is great, and that there is a tremendous disruption of the very workings of the court. For these reasons, defense counsel restrained themselves from moving for a mistrial with each act of defense counsel. There reached a point, however, where the possibility of a fair trial faded. The balance between judicial administration and prejudice to parties came into sharp conflict.

It must be recalled that the court's attempt to restrain plaintiffs' attorney was made in the *absence of the jury*. Had counsel desisted, the trial could have proceeded in a fair and rational manner, reducing prejudice. Counsel Did Not Desist. He obviously is an attorney with a tremendous amount of intestinal fortitude, so intent on victory that he was willing to absorb much personal abuse, provided that he is able to "make his points" with the jury. Plaintiffs' counsel knew full well that the admoni-



*Affidavit of Lester Fetell in Support of Motion for New Trial*

tions of the Court were on the *record*, but not before the *jury*, so that he was assured of the success of his tactics vis a vis the *jury*.

There were times when the Trial Judge, in utter desperation, overruled defense objections to persistent repetition, on what appeared to be a judicial determination that the court would give counsel "enough rope to hang himself". Apparently that did not succeed. We do not know whether the jury even realized that plaintiffs' attorney was being contemptuous of the Court's direction; this may have been too subtle for the jury. We do not know whether the jury developed a sympathy for the plaintiffs themselves, a form of reverse psychology. In any event, counsel kept getting in his "licks". He took tremendous risks with the *Court*, in return for a large verdict. This heroism has no place in the Courtroom, and is not to be condoned.

A prime, but most unfortunate, example of these tactics, is to be found in the record (s. m. 2431-6) wherein Mr. Edelman attempted to read from the Vassar Bros. Hospital record to show that the history contained therein was consistent with plaintiffs' story. The jury was excused, Mr. Edelman properly admonished, and the jury recalled. What Was The Very Next Thing Mr. Edelman Said? He started to read from the same proscribed record indicating a history that the accident happened at 11:30 A. M. It is urged that the Court's admonition to the jury at that point was not sufficient to overcome the devastating effect of the jury fixing the time of the accident at 11:30 A. M. The proof can be found in the fact that the jury requested the reading of the testimony of both Mr. Schact and Mr. Newmark, the two witnesses whose testimony created the issue as to the time of the happening of the accident. If the jury believed that the accident happened at 11:30 a. m., then the testimony of Diaco, McDowell, DuBois & H. Utegg was all for naught.

*Affidavit of Lester Fetell in Support of Motion for New Trial*

If the jury believed that the accident happened after 12 noon, then their testimony that they were at lunch enabled the jury to find that *no truck* was on the road at lunch time. Time was a critical issue in this case, and plaintiff's counsel knew that. This was the reason he was willing to risk a contempt citation in order to read into his summation the history at Vassar Bros. Hospital. How close to the edge of contempt Mr. Edelman skirted.

It is earnestly, and most forcefully urged that a verdict of \$1000.00 would be unjust under these circumstances, let alone a verdict of \$378,000.00. Does not the plaintiff now have the "last laugh"? All of the anger which plaintiffs' counsel engendered, all of the disrespect for the judicial process which he demonstrated, are mere anecdotes, the record is no more than a scrapbook; the plaintiffs made their point, they are the proud and delighted beneficiaries of a \$378,000 verdict. What does it matter to them how they obtained it? The defendants and the court remain behind as pawns, and mere instruments which resulted in a large verdict for plaintiff. What benefits do the defendants derive from counsel's disingenuous apologies to the court from his "misunderstanding" of the court's rulings, for his lapses of memory? Defendants do not now present themselves as guardians of judicial decency. This motion is not made to vindicate the judicial system. This motion is made to correct a rank injustice which has resulted in an outrageous verdict. Which ear does this verdict represent? The alleged left one, or the right ear, which was described to one physician as 58% deaf (Dr. Peimer) and to another as normal (Dr. Kaplan). Apparently plaintiffs don't care.

It may very well be that the court should not be concerned with the size of the verdict, in which case the court has the duty to vindicate the judicial system, and grant a new trial.

*Affidavit of Lester Fetell in Support of Motion for New Trial*

This case is fresh in the mind of the trial court, and it would serve no useful purpose to go through the voluminous record to pin point the multitude of examples of unfairness, suffice it to say that the task of culling the record is a simple one, so vast are citable examples. Including the presence of the children.

2. THE RULINGS WITH RESPECT TO THE TESTIMONY OF DAVID UTEGG.

It is obvious that had plaintiff not had the benefit of the admissions of David Utegg that he drove the truck down the road at 11:30 a. m. plaintiffs' proof would have been in desperate jeopardy. It is beyond cavil that defendants' ability to destroy that testimony was vital.

On the Friday last prior to the start of the trial, defendants made it perfectly clear to the court that David Utegg's testimony in the *de bene esse* deposition had to be overcome. It was an important part of the defense. The court made certain rulings with respect thereto, and counsel attempted to comply, assuming all the while that the court understood the importance of this aspect of the defense. Frankly, we were quite shocked when the following ruling was made at the trial (s. m. 2100):

"The Court: No, you can't testify to any conversations you had with your brother"

Note, now, the following colloquy from the record of the Friday application (s. m. 34):

"The Court: . . . But you have a way of attacking the credibility of Utegg. If he made all of those statement to a *trained investigator*, have the investigator here to tell the jury that he's a liar, *That's the way to do it.*"

*Affidavit of Lester Fetell in Support of Motion for New Trial*

It happens that to one to do this was not an investigator, but the witnesses' own brother Harold. We did not feel compelled to advise the court or counsel of that fact, so long as we had a ruling from the court that we could bring in the *person* to whom David "made all those statements"; be he an investigator or brother. The court suggested that we have in court the one to whom David made those statements, *and we did!* His name was Harold Utegg, and we attempted to have him "tell the jury he's a liar".

If an investigator could testify as to admissions or statements made to him by David, why could Harold not so testify? We did not understand the court to have ruled that in order for us to bring in such proof, the witness had to be an investigator. For five days Harold Utegg was in court, waiting to be reached, only to have the court rule out the very essence of his testimony. It was our view that the admissions made by David to his very own brother would be devastating, and totally credible. Unlike opposing counsel, Mr. Sergi accepted the trial court's ruling, without resort to ingenious tricks to circumvent the court, or defy the court. The ultimate effect of this lawyerlike conduct was to deprive the jury of testimony from Harold which we knew would have a vital effect on the plaintiffs' case.

We do not comprehend the ruling of the court. If the conversations between David and Harold was not admissible, how else could we bring forth proof that not only was David a liar, but he so much as admitted it to his brother?

We recall the court stating that in connection with an attempt to resolve the problem of David Utegg, without granting a continuance, the court "painted itself into a corner" (s. m. 2286). Be that as it may, we earnestly urge that we followed the court's Friday ruling, to the letter. Harold Utegg's vital testimony should not have been ruled out.



*Affidavit of Lester Fetell in Support of Motion for New Trial*

It is significant to note that the problem arose because plaintiffs' counsel played fast and loose with the court. The histrionics of Mr. Orseck in offering to hire an ambulance to bring David in were ludicrous. He had no intention of so doing. The argument that David could not travel was unsupported. Deponent stated on the record that he personally ascertained that David was not confined to his home, and did in fact travel to visit family. I now state, as an officer of this court that David declined my invitation to be driven to and from the court. Why was Mr. Orseck permitted to "fudge" (the court's words (s. m. 2321) on his promise made to the court? The grandstand play on the earlier Friday dissolved when the moment of truth arrived. They never intended to bring in David Utegg. Why else was he the only witness deposed *de bene esse*? Each and every witness called by plaintiffs was beyond the 100 mile subpoena limit, and yet they appeared. Schacht was 81 years old. They had no assurance that he would live long enough to testify in person, and yet he was not deposed. Mr. Sergi argued strenuously that David had to confront the court and jury. It is respectfully suggested that the court re read the deposition (#1) of David Utegg. He never said he was down the road, he merely agreed with Mr. Edelman, in a deposition room where the masterful technique of leading questions could not be controlled by a Judge.

This case is a true travesty of justice. We respectfully urge that at the expense of additional disruption of the court's calendar, the judgment herein be vacated and a new trial granted.

The interests of justice so demand.

(Sworn to by Lester E. Fetell, Decemoer 14, 1974.)

**Opinion and Order Denying New Trial.**

## UNITED STATES DISTRICT COURT,

## EASTERN DISTRICT OF NEW YORK.

Defendants move for a new trial pursuant to Fed. R. Civ. P. 59<sup>1</sup> based on: (1) the conduct of plaintiffs' counsel which deprived defendants of a fair trial; and (2) error in refusing to admit into evidence statements allegedly made by David Utegg to his brother, Harold Utegg.

Plaintiff Robert Elliott claimed that serious personal injuries were inflicted on him on the morning of April 25, 1972, when he was struck by a plank which fell from a passing dump truck, owned by defendant Gorr and operated by an employee of one of the defendants, Maggiolo Corporation (lessee of the truck). Vigorous and intensive investigations of the manner of the happening of the accident by both sides resulted in charges by defendant Maggiolo of a fraudulent claim and subornation of perjury on the part of the plaintiff.

As to the defendants' first ground for a new trial, it is quite accurate to say that the conduct of plaintiffs' trial counsel was reprehensible. However, the court did everything within its power to counteract any prejudice caused by this behavior. The court is convinced that its strong reprimand before the jury of plaintiffs' trial counsel removed any possible advantage to plaintiffs or prejudice to defendants. In any case, Maggiolo cannot now ask for relief on this basis since he was offered a mistrial and declined it.<sup>2</sup> He has, thus, waived his right to raise this argument again in a motion for a new trial.

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<sup>1</sup>The motion was made pursuant to Fed. R. Civ. P. 50(b), i. e., for judgment notwithstanding the verdict.

<sup>2</sup>Tr. at 2434.

*Opinion and Order Denying New Trial*

On November 22, 1974, counsel for Maggiolo requested an adjournment of the trial scheduled to start on November 25, 1974, on the ground that plaintiffs had devised a scheme for keeping David Utegg from testifying before the jury and for using instead his deposition taken on July 11, 1974. Maggiolo claimed that David Utegg had since recanted but that the recantation could not be brought before the jury because the witness was in the hospital.<sup>3</sup> The court suggested that the witness' inconsistent statements and/or recantation could be brought before the jury through a second deposition. A second deposition of David Utegg was then taken on Sunday, November 24, 1974, in which he denied making the several statements inconsistent with his previous deposition.

The ruling on the admissibility of the prior statements made by David Utegg was explained by the court on a number of occasions. In essence, it was that Maggiolo failed to establish a proper foundation for the hearsay statements. In using prior inconsistent statements to impeach a witness, the cross examiner must first ask the witness if he made the statement, specifying the time and place at which it is alleged to have been made. If the witness does not admit making the statement, the cross examiner may then prove that the alleged statement was in fact made. *U. S. v. Wright*, 489 F. 2d 1181 (D. C. Cir. 1973); *Fortunato v. FMC*, 464 F. 2d 962 (2d Cir. 1972); *U. S. v. Hayutin*, 398 F. 2d 944 (2d Cir. 1968); McCormick, *Evidence*, §37 (1972).

Maggiolo made the same argument during the trial that he makes now with reference to the ruling on admissibility of prior statements. When the court suggested a second deposition, it did so on the statement of counsel that David Utegg had made statements to defendants'

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<sup>3</sup>David Utegg had undergone an eye operation November 20 or 21. He was outside the territorial jurisdiction of the court.

*Opinion and Order Denying New Trial*

investigator indicating that he gave false testimony at the first deposition. The court's suggestion was not intended to indicate that it would be unnecessary to establish a proper foundation for the admission of these prior statements.

Further, the court offered Maggiolo a continuance for the purpose of conducting a third deposition of David Utegg in order to establish a proper foundation for the admission of the prior statements.<sup>4</sup> The offer was refused, and Maggiolo, in effect, waived his right to use this ground for a new trial as well. The court also notes that Harold Utegg did testify that David Utegg told plaintiffs' counsel in Harold's presence that he did not drive his truck down Glenwild Road on the morning of April 24, 1972.<sup>5</sup> Plaintiffs' counsel made no objection to this testimony and it was admitted in evidence. Under such circumstances, it is difficult to see how Maggiolo was substantially prejudiced by the court's refusal to admit David Utegg's prior inconsistent statements.

Accordingly, defendants' motion for a new trial is in all respects denied and it is

13—Sergi 5747

So ORDERED.

Barry

JACOB MISHLER  
U. S. D. J.

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<sup>4</sup>Tr. at 2293.

<sup>5</sup>Tr. at 2093.



**Plaintiffs' Affirmation of Jerome Edelman and Exhibits  
in Opposition to Defendants' Motion for New Trial.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

State of New York,  
County of Kings,      ss:

JEROME EDELMAN, an attorney admitted to practice in the Courts of the State of New York, affirms under penalty of perjury:

That he is a member of the firm of Edelman, Berger, Peters & Koshel, P. C., attorneys for the plaintiffs herein and is fully familiar with all the pleadings and proceedings heretofore had herein.

This affirmation is submitted in opposition to defendant's motion for a new trial.

The defendant's affidavit sets forth two grounds upon which this new trial is to be granted—(1) the conduct of plaintiffs' trial counsel and (2) that Your Honor committed error in excluding the testimony of Harold Utegg and Brian DuBois to impeach the testimony of David Utegg.

Regarding the first charge: Stripping away the scornful rhetoric there are only two alleged instances of my alleged misconduct. One is that I attempted to read the history from the Vassar Brothers Hospital record and two that I started to read from the same record the time of the accident as 11:30 a.m.

It should be remembered that the defendants caused or permitted the introduction of the following material in an attempt to impeach plaintiffs' witnesses:

1. The original card of Dr. Costantino (Exhibit 4 at the trial and marked Exhibit 1A hereto)
2. The report of Dr. Costantino which contained the history (Exhibit 5 at the trial and marked Exhibit 1B hereto)

*Plaintiffs' Affirmation of Jerome Edelman and Exhibits in  
Opposition to Defendants' Motion for New Trial*

3. The card of Dr. Gaynin (Exhibit O at the trial and marked Exhibit 1C hereto)

It should also be remembered that on cross examination defendants' counsel asked Dr. Gaynin where he got the information that caused him to make some change of the history on his card and that he stated he obtained it from the Vassar Brother Hospital record. Your Honor then also asked the same question and the witness stated that he obtained this history from the Vassar Brother Hospital record (S. M. 1021-1022—Exhibit 1D hereto).

Each of plaintiffs' doctors were permitted to testify as to the history given to them by the plaintiff. The plaintiff also testified without objection that he gave the history to each of the hospitals and it was written down by each of the hospitals, as he gave it (S. M.     ).

The defendants' statement that I attempted "to read from the Vassar Brothers Hospital record to show that the history contained therein was consistent with plaintiff's story" is not factually correct. Attached hereto as Exhibit 1E are S. M. 2431-2435 which specifically shows (at S. M. 2431) that I strictly adhered to the evidence and reminded the jury that Robert Elliot testified that when he went to the Vassar Brothers Hospital that they asked him the history and he gave them the history and that (page S. M. 2433) he told Dr. Gaynin the same history. When on cross examination Mr. Sergi asked Dr. Gaynin where he got the story that caused him to change his card to "from highway" to "from truck" he stated that he got it from the Vassar Brother Hospital. This was strictly from the record. At no time did I attempt to read the Vassar Brothers Hospital history.

The defendants second claim that I read from the same record indicating that the accident happened at 11:30 a.m. (page 3-4 of defendants' affidavit) is also in error. The time of 11:30 a.m. that I referred to appears in the Com-

*Plaintiffs' Affirmation of Jerome Edelman and Exhibits in  
Opposition to Defendants' Motion for New Trial*

munity Hospital record. It should be remembered that the Community Hospital record was introduced by the plaintiff at the early part of the trial and the Court sustained Mr. Sergi's objection to the history. At that time plaintiff did not know that Mr. Sergi would try to prove that the accident occurred during lunch hour between 12:00 and 12:30 p.m. Nothing was said of this fact in the opening.

Mr. Sergi attempted to make the time of some significance by introducing the compensation report signed by Mr. Newmark which stated the time of the accident to be 12:30 p.m. One of the objections to said compensation report made by plaintiffs' counsel was that Mr. Newmark could not testify as to the time of the happening of the occurrence, having no personal knowledge, and therefore his report containing this statement should not be admitted.

Mr. Diaco, Mr. DuBois and Mr. McDowell all testified that the lunch hour was between 12:00 and 12:30 p.m. Mr. Diaco testified that they were only carrying sand during the morning and first began to carry any debris to the dump between 1:30 and 2:00 p.m. Mr. DuBois and Mr. McDowell testified that they first began carrying debris to the dump between 3:00 and 3:30 p.m.

The statement at page 4 of the defendants' affidavit "if the jury believed that the accident happened at 11:30 a.m., then the testimony of Diaco, McDowell, DuBois & H. Utegg was all for naught." is also not correct. The critical part of the case is whether or not a board fell from one of Maggiolo's trucks and hit the plaintiff. It does not make any difference whether the accident happened at 12:45, 11:30 or 12:00 p.m. As a matter of fact, Diaco's statement taken by the defendant and produced upon the trial contained:

*Plaintiffs' Affirmation of Jerome Edelman and Exhibits in  
Opposition to Defendants' Motion for New Trial*

"From 12 noon to 12:30 P.M. myself and my crew including the Gorr truck drivers were at lunch at a luncheonette near Highland Avenue & Broadway in town. *The trucks were located with some at the dump and some at the town job demolition site.* (Italics supplied) (S.M. 1641—Exhibit 1G hereto)

Regarding the time of 11:30 a.m. I was under the impression that the history in the Community Hospital record of how the accident happened was kept out but not the time of admission nor the time reported in the record as to the happening of the accident. Certainly the defendants could have and should have specifically delineated which portion of the record they wanted kept out. This was not done. In any event, Your Honor not only admonished me in front of the jury but you offered Mr. Sergi a mis-trial and Mr. Sergi not only rejected your Honor's offer but stated "I do not want a mis-trial I rely upon Your Honor to correct it in your charge, if you can". (S.M. 2434—Exhibit 1H hereto)

It is respectfully submitted that it is well established that after refusal of the court's offer to grant a mis-trial defendant may not seek a mis-trial after rendering of an unfavorable verdict. In other words, defendant cannot sit back and wait for a result and then seek relief. (Please see plaintiffs' accompanying memorandum of law).

It is also contended that Mr. Sergi should not be the one who should throw the first stone. It should be remembered that Mr. Sergi's cross examination of Robert Elliot lasted for approximately two (2) days and on numerous occasions he attempted to stall and prolong the case. Regarding the conduct of both counsel, Your Honor stated:



*Plaintiffs' Affirmation of Jerome Edelman and Exhibits in  
Opposition to Defendants' Motion for New Trial*

"If I were to base it on this case alone, I might say everything I said to Mr. Edelman I should be saying to Mr. Sergi. It so happens that in my experience with Mr. Sergi it hasn't been as bad with Mr. Edelman." (S.M. 2282—Exhibit I hereto)

With regard to defendants' second point, the charge that Your Honor committed error with respect to the testimony of David Utegg and particularly with respect to the attempted testimony of Harold Utegg is without foundation.

Your Honor was perfectly correct when he ruled that in order to impeach a witness by any subsequent or contradictory statements that a preliminary warning must be given to him so as to give the witness the opportunity to either deny, modify or explain the alleged statements. The law is well settled that the failure to give such a preliminary warning is fatal and such evidence is not admissible. Our courts have repeatedly held that this warning must be specific as to the time, place, person and that the witness should be confronted with the words used or the substance. The main purpose of the examination at the Scranton Hospital of David Utegg was to permit Mr. Sergi to lay such a foundation. This he failed to do. Mr. Sergi admitted that he failed to confront the witness with these statements. Thereafter, Your Honor, prior to summation, again told Mr. Sergi that he failed to lay the necessary foundation and specifically offered to adjourn the case and give Mr. Sergi the right to depose Mr. David Utegg again. Your Honor specifically stated:

"I will adjourn the case. I will give you the right to depose Mr. Utegg again and ask him those questions specifically so that you can repair the damage or at least conduct the examination with what

*Plaintiffs' Affirmation of Jerome Edelman and Exhibits in  
Opposition to Defendants' Motion for New Trial*

you now know is the ruling of the Court and then bring Dubois back.

"Mr. Sergi: I appreciate your very charitable offer, your Honor, but I have had enough of this trial. I would like to end it. This is the third week. I have other commitments." (S.M. 2293—Exhibit 1J hereto)

It is respectfully submitted that the rejection by Mr. Sergi of Your Honor's offer is a complete waiver of this point. This is upon the same grounds that the defendants can not sit back and wait for a verdict and then in the event that it is unfavorable to ask that a new trial be granted on the same grounds. (See plaintiffs' memorandum of law for citations).

A further point is that the defendant refers to his questioning of Harold Utegg (S.M. 2100—Exhibit 1K hereto):

"Q. When was the next time you have any conversation with your brother David? A. When he come back from New York. I called him up on the phone that night and asked him how everything went.

"Q. Yes?

"Mr. Edelman: I respectfully object to that conversation.

"The Court: Objection sustained.

"The Witness: Your Honor?

"The Court: No, you can't testify to any conversations you had with your brother David."

At page 6 of the defendant's affidavit the defendant first indicated to Your Honor that these statements were made to a trained investigator. Then upon the trial de-

*Plaintiffs' Affirmation of Jerome Edelman and Exhibits in  
Opposition to Defendants' Motion for New Trial*

defendants admitted that all they tried to do by this testimony was to attempt to have Harold Utegg tell the jury "that he is a liar".

The statement that Your Honor excluded the testimony of Brian DuBois, page 1 of defendants affidavit, is also in error. There was no attempt by Mr. Sergi to have Mr. DuBois testify as to any conversations with Mr. David Utegg. As a matter of fact he testified at great length as to what occurred in Mr. Orseck's office in contradiction to many things that David Utegg testified to in his deposition that occurred in Mr. Orseck's office.

It is also noteworthy that there is not one legal citation in defendants' affidavit to support defendants' position.

WHEREFORE, your deponent respectfully requests that this motion be denied.

Dated: Brooklyn, New York  
December 19, 1974

JEROME EDELMAN

DATE  
12/24/74  
C4  
/



45a

EXHIBIT 1A, ANNEXED TO AFFIRMATION OF  
JEROME EDELMAN.

SUBSEQUENT FINDINGS & TREATMENT		AGE	PHONE NO.	DATE	REF. BY
<p>berTy N.Y.</p> <p>Accident: Hit in face by a plank which fell off a passing truck. while working Px: Extensive lacerations of face &amp; nose, laceration of left side of face extending deep to bony structures &amp; involving nose, left side of face and upper lip. Bony chips are removed, wound cleaned and sutured &amp; casted &amp; 14 silk suture. Sent to Liberty Hosp for further evaluation of possible bone fractures. Tettoxoid 0.5cc given</p>		<p>Bob</p>	<p>SS-216-40-6178</p>	<p>4-24-71</p>	<p>med report in patient file</p>
TOTAL					
EXAMINATION:					



46a

*Elliott, Bob*

EXHIBIT 1B, ANNEXED TO AFFIRMATION OF  
JEROME EDELMAN  
WOODRIDGE MEDICAL CENTER  
HYMAN O. IMMERMANN, M. D.  
S. COSENTINO, M. D.  
WOODRIDGE, N. Y. 12789

June 8, 1972

Re: Bob Elliott  
Liberty, N.Y.

To whom it may concern:

On April 24, 1972, Mr. Bob Elliott was brought into this office because of injuries he sustained when a log or plank fell off a passing truck and struck him in the face. He stated that he was cleaning the cover of a catch basin on the Woodridge-Glen Wild Road when the accident happened.

A quick examination at that time clearly revealed that the injuries were grave. The most severe of his injuries involved his nose, the left side of his face, upper lip and left eyelid. These areas were torn by lacerations which extended from the left eyelid, nose and upper lip; he also had lacerations of the chin. It was obvious that the facial bones were fractured since the fractures were visible through the lacerations. The maxillary bone and teeth were fractured. The extensive lacerations were temporarily repaired with 8 catgut sutures and 14 skin sutures. The injuries were so multiple and severe that I referred him immediately to the Community General Hospital of Liberty for more extensive evaluation and treatment.

Respectfully yours,

SC:rr

Salvatore Cosentino, M.D.



47a

EXHIBIT 1C, ANNEXED TO AFFIRMATION OF  
JEROME EDELMAN

LIABILITY  
COMPENSATION RECORD

Name	Mr. Robert Elliot			Age	30	Address	Bradley Starr /Route, Liberty N.Y.	
Employer	Address							
Date of Accident	4/24/72		A.P.M. Treated by	\		Date		
Your First Treatment	8/14/72		By Whose Order?	Which? <i>[Signature]</i>				
Patient's Detailed Story of Accident	While on highway, was struck by plank from <i>[Signature]</i>							
Injury (objective findings)								
Liability Result of Said Injury?			Is Cause Competent?					
Dates Probable Return to Work?			Any Work?			Kind?		
RE MARKS:								
(A) X-Ray or Lab.	✓ SC 62 20/15							
(B) Perm. Defects								
(C) Disfigurements								
(D) Pre-Exist. Disease								
(E) Actual Return to Work	OS L.P. <i>[Signature]</i>							

**Exhibit 1D, Annexed to Affirmation of Jerome Edelman.**

(1021) sight nor his hearing has improved.

"I respectfully request that you prepare and mail to me a detailed report of the several examinations made by you, the treatment afforded by you, your diagnosis as well as prognosis.

"Please be good enough to comply with this request at the earliest possible moment.

"Respectfully yours, Sidney Orseck."

(Whereupon, Mr. Bernhard entered the courtroom.)

*Cross Examination by Mr. Sergi: (Cont.)*

Q. Doctor, you heard me read the history as Mr. Orseck gave it— A. Right.

Q. —In Exhibit P.

You say in your exhibit, which you added in handwriting "which fell from truck" the history as Mr. Orseck gave it, "A plank or board extended beyond the body of the truck, hit him in the face as the truck went by."

Where did you get the history that the board fell out of the truck? A. I must have gotten it on a subsequent time.

Q. From Mr. Orseck? A. No.

(1022) Q. Now, keeping in mind— A. Excuse me. In the Vassar Brothers Hospital—

Mr. Sergi: Objection.

Mr. Edelman: Your Honor, he should be—

Mr. Sergi: Your Honor, Vassar Brothers Hospital was excluded and I object to the doctor reading it.

The Court: Objection overruled if that's the basis of the objection.

Did you get it from the Vassar Brothers Hospital record?



*Exhibit 1D, Annexed to Affirmation of Jerome Edelman*

The Witness: Yes. I see it now.

The Court: I'll take that as the answer.

The Witness: There it is.

The Court: Now, Mr. Edelman, I don't want any sign of confirmation by you. You are not a witness, you are the lawyer.

By Mr. Sergi:

Q. Well, now, Doctor, the letter that came to you from Mr. Orseck was dated October 4, 1972. Your report, your narrative report was dated October 13, 1972.

It was in response to the letter from Mr. Orseck; is that correct? A. Correct. And that had the history—



**Exhibit 1F, Annexed to Affirmation of Jerome Edelman.**

(2431) Number three, if you remember, Mr. Ellio to you that when he got into the hospital itself, the Community General Hospital in Liberty, they asked him what occurred, and he told them exactly what had occurred.

By the way, he told them that a passing truck, a board fell off and hit him in the face, and they told them and they wrote it down. Certainly at that time it is incredible that he would not be telling the truth, if you are looking for where the truth is.

Did they ever confront him with anything that indicated one single deviation from the simple truth, as this man told it from the day of the happening of this occurrence?

Then the next thing is, he is taken from there to the Vassar Brothers Hospital in Poughkeepsie, and if you remember, and at that time it was virtually emergency operations, so later the same day, long before any lawyer is even in the case—and you remember at that time he also stated, they asked him the history, and he gave them the history exactly as he said it, and—

Mr. Sergi: Excuse me, your Honor, that was not included in the Exhibit, it was excluded by your Honor, and he is now commenting on the—

The Court: May I have that statement?

(2432) (Record read.)

Mr. Edelman: This is Mr. Elliott's testimony. They wrote it down. That's all, nothing more than that. You remember—

The Court: What do you say about it, Mr. Sergi?

Mr. Sergi: He is referring to a—

The Court: Is there any application?

Mr. Sergi: I object, your Honor, to his comments on evidence which—on history which is not in evidence. He is referring to it and saying that it confirms the plaintiff's position.

*Exhibit 1F, Annexed to Affirmation of Jerome Edelman*

He doesn't have to read it.

The Court: I have excluded any history in any hospital report. That is as a matter of law. Don't consider it.

Mr. Edelman's repetition of the history does in no way add to the credibility of Mr. Elliott's testimony that he gave before you on the witness stand. You understand that. It was only admitted for one purpose, to show the treatment, and to the extent that the history was necessary for the treatment, it was admitted, and for no other reason.

So the repetition by Mr. Edelman of all the histories before the doctor, and the implication that he (2433) might have given it elsewhere, adds nothing whatsoever to Mr. Elliott's testimony.

Now go ahead, Mr. Edelman.

Mr. Edelman: All right.

Remember also Dr. Ganin got on the stand, and they asked him about his records, and Dr. Ganin—By the way, this is in evidence, and I am strictly sticking to the record, your Honor.

Mr. Robert Elliott, he says, patient, detailed story of accident, "While on highway was struck by plank." And originally was, "from highway." It was changed from "highway" to "from truck" with the same pen, as you see, as the entire examination.

And then later on, apparently, he went ahead and added in another pen, "which fell from truck."

Mr. Sergi asked him where he got this story, where it fell from the truck, and he said he got it from the Vassar Brothers Hospital record.

Mr. Sergi: Your Honor, I must object strenuously. Why does he refer to something your Honor told him not to refer to?

The Court: The jury may be excused.

(Jury excused.)

*Exhibit 1F, Annexed to Affirmation of Jerome Edelman*

The Court: What do you want me to do, Mr. Sergi?  
(2434) Do you want a mistrial at this late stage?

Mr. Sergi: I cannot believe—

The Court: Do you want a mistrial?

Mr. Sergi: Let me put my comment on the record, I have to get it off my chest.

The Court: I am ready for it, Mr. Edelman.

Mr. Sergi: I cannot believe that he is doing it without intention. He knows he should not.

The Court: Of course he is.

Mr. Sergi: And he is doing it and doing it and doing it. I don't want a mistrial. I will rely on your Honor to correct it in your Charge, if you can. I trust that you will, because at this stage, after practically three weeks of work, and all of this money spent, I don't think we can ask for a mistrial, not at this point.

The Court: Seat the jury.

(Jury present.)

The Court: There is only one legitimate reason for Mr. Edelman to comment on the various histories, and that is to answer Mr. Sergi's argument, in effect, that the histories were planted with the various doctors by Mr. Orseck.

It is improper for Mr. Edelman to attempt to use (2435) the various histories given by Mr. Elliott in order to show how the accident happened. I repeat that there is only one reason that the history that Mr. Elliott gave to the doctors was permitted, and that is because the doctors required it for treatment. You had a right to know what Mr. Elliott told. Any other use that Mr. Edelman makes out of it is improper.

I have cautioned him a few times about it. I keep reminding you so that you may not be confused by Mr. Edelman's recital of the number of times that Mr. Elliott

*Exhibit 1F, Annexed to Affirmation of Jerome Edelman*

gave histories to various doctors, and certainly references to the histories that were contained in hospital records is totally improper.

We run this trial according to fixed rules. Mr. Edelman knows it. He's been told about them, and any comments by him about what was in the hospital report, or any implication, or inference, that he asked you to draw about what was in the hospital report, is improper.

Go ahead, Mr. Edelman.

Mr. Edelman: Thank you, your Honor.

In connection with the original hospital record, the record of Community General Hospital regarding time, you will see that according to that portion of the history, it says, "11:30 A.M." Not 12:00 o'clock. This was made



**Exhibit 1G, Annexed to Affirmation of Jerome Edelman.**

(1641) The Clerk: It's over here.

Mr. Edelman: Oh. May I?

Q. At page 4 of your statement, have you got page 4, sir? A. Yes.

Q. All right.

About the eighth line down, it says, "From 12:00 noon to 12:30 p.m., myself and my crew, including the poor truck drivers, were at lunch and I was at a luncheonette near Highland Avenue and Broadway in town. The trucks were located—were some at the dump and some at the town job demolition site."

Did you specifically state that in your statement? A. Yes.

Q. All right.

And if that's so, isn't it a fact that prior to 12:00 o'clock, one of the trucks or some of the trucks would have to be hauling debris from the demolition site in town to the dump?

Mr. Sergi: Objection.

The Court: Sustained as to form. It's argumentative.

Will you please ask the witness whether the

**Exhibit 1H, Annexed to Affirmation of Jerome Edelman.**

(2434) Do you want a mistrial at this late stage?

Mr. Sergi: I cannot believe—

The Court: Do you want a mistrial?

Mr. Sergi: Let me put my comment on the record, I have to get it off my chest.

The Court: I am ready for it, Mr. Edelman.

Mr. Sergi: I cannot believe that he is doing it without intention. He knows he should not.

The Court: Of course he is.

Mr. Sergi: And he is doing it and doing it and doing it. I don't want a mistrial. I will rely on your Honor to correct it in your Charge, if you can. I trust that you will, because at this stage, after practically three weeks of work, and all of this money spent, I don't think we can ask for a mistrial, not at this point.

The Court: Seat the jury.

(Jury present.)

The Court: There is only one legitimate reason for Mr. Edelman to comment on the various histories, and that is to answer Mr. Sergi's argument, in effect, that the histories were planted with the various doctors by Mr. Orseck.

It is improper for Mr. Edelman to attempt to use (2435) the various histories given by Mr. Elliott in order to show how the accident happened. I repeat that there is only one reason that the history that Mr. Elliott gave to the doctors was permitted, and that is because the doctors required it for treatment. You had a right to know what Mr. Elliott told. Any other use that Mr. Edelman makes out of it is improper.

I have cautioned him a few times about it. I keep reminding you so that you may not be confused by Mr. Edelman's recital of the number of times that Mr. Elliott gave histories to various doctors, and certainly references to the histories that were contained in hospital records is totally improper.

*Exhibit 1H, Annexed to Affirmation of Jerome Edelman*

We run this trial according to fixed rules. Mr. Edelman knows it. He's been told about them, and any comments by him about what was in the hospital report, or any implication, or inference, that he asked you to draw about what was in the hospital report, is improper.

Go ahead, Mr. Edelman.

Mr. Edelman: Thank you, your Honor.

In connection with the original hospital record, the record of Community General Hospital regarding time, you will see that according to that portion of the history, it says, "11:30 A.M." Not 12:00 o'clock. This was made. (2436) Mr. Sergi: Your Honor, I don't know whether he doesn't understand you. If 11:30 is not part of the history, I don't know what is part of the history.

The Court: The time he checked into the hospital?

Mr. Sergi: He's talking about the time of the accident, 11:30 A.M.

Mr. Edelman: Not the manner in which the accident happened.

The Court: Are you saying that the hospital record says he came into the hospital 11:30?

Mr. Edelman: No. It states the fact that the accident happened 11:30.

The Court: Of course that is wrong. Of course it's wrong. Mr. Edelman, you know better. You are an experienced trial lawyer.

I keep admonishing you about things, but you pay no attention to me whatsoever. There are rules, and the rules are intended for fair trial, but you won't obey them.

Go ahead.

Mr. Edelman: Let's come back to this case. As far as the next individual who was on the witness stand, it was Bob Elliott, this gentleman here. If you remember, Ladies and Gentlemen of the Jury, Bob Elliott, on

**Exhibit II, Annexed to Affirmation of Jerome Edelman.**

(2282) Mr. Fetell: All right. Then I want to get it clear.

The Court: All right. Now, my rulings are in no way intended to limit Mr. Edelman to the language used in the testimony. We talked about fair comment.

Mr. Fetell: Yes sir.

The Court: Now look—

Mr. Fetell: We know what the—we know what the track record of fair comment in this case is, and it's been a problem to us.

The Court: You have to have a sense of the case and you have to be fair about it. There is some amount of flexibility that must be given to counsel. I dare say that Mr. Sergi—we haven't turned to him yet because he doesn't have that kind of a track record.

Mr. Fetell: That's right.

The Court: If I were to base it on this case alone, I might say everything I said to Mr. Edelman I should be saying to Mr. Sergi. It so happens that in my experience with Mr. Sergi it hasn't been as bad with Mr. Edelman. So I am not talking about—

Mr. Fetell: If Mr. Sergi didn't try this case—otherwise he would be guilty of malpractice.

The Court: That's what we call water over the



**Exhibit 1J, Annexed to Affirmation of Jerome Edelman.**

(2292) would read the second examination before trial held in the hospital for over two and a half hours, I practically made no objections and he went—

The Court: But the cross examination was misconceived. Do you see, had I made the ruling and Mr. Utegg was here, then he could have asked Mr. Utegg the very questions that he could not now ask because it was a deposition. Mr. Sergi obviously was under the impression that all he had to do was ask Mr. Utegg, David Utegg, what happened, and he'd just deny it. He never asked him whether he made certain statements.

(2293) Mr. Orseck: Yes, he did.

The Court: To Brian, Dubois and to his brother Harold Utegg. And, therefore, Mr. Sergi was precluded from bringing that cross examination before the jury.

Would you have any objection—would you have that objection to the admissibility of the evidence?

Mr. Edelman: No.

The Court: And let it come in and let him bring it before the jury.

Mr. Edelman: No.

The Court: All right. So you want it all ways. There is still another way, incidentally, and I will do it if you wish. I will adjourn the case. I will give you the right to depose Mr. Utegg again and ask him those questions specifically so that you can repair the damage or at least conduct the examination with what you now know is the ruling of the Court and then bring Dubois back.

Mr. Sergi: I appreciate your very charitable offer, your Honor, but I have had enough of this trial. I would like to end it. This is the third week. I have other commitments.

I am satisfied with what your Honor has suggested, that I have a right to comment to the jury exactly as your Honor indicated to me on Friday. And I

**Exhibit 1K, Annexed to Affirmation of Jerome Edelman.**

(2100) *Direct Examination by Mr. Sergi: (Cont'd.)*

Q. When was the next time you have any conversations with your brother David? A. When he come back from New York. I called him up on the phone that night and asked him how everything went.

Q. Yes?

Mr. Edelman: I respectfully object to that conversation.

The Court: Objection sustained.

The Witness: Your Honor?

The Court: No, you can't testify to any conversations you had with your brother David.

The Witness: All right.

By Mr. Sergi:

Q. By the way, Harold Utegg, how long was your brother having trouble with his eye? A. How long?

Q. Yes. A. He's been having trouble a couple of years.

Q. On April 24, 1972, what was his eyesight then? A. He had one eye.

. . .

### Charge of the Court.

(2500) (Jury present.)

The Court: Mr. Foreman and ladies and gentlemen of the jury:

We have arrived at that point in the trial where it becomes my duty to instruct you on the applicable law.

A good starting point, I think, is to instruct you on the reason that the various participants in the trial are here.

First we have the lawyers. They have completed their duties with respect to producing evidence before you. This is known as an adversary proceeding because the adversaries take different positions on disputed questions. On rare occasions I say it is as if they were combatants, but I think that that is an overstatement in the usual trial. But in this trial, I think that you recognize that the lawyers were in a position of adversaries and possibly combatants.

The theory is that when two lawyers of comparable ability contest over an issue, they will develop the evidence that is pertinent to the contested issues.

We have two very competent lawyers that were in the fight. Mr. Bernhard demonstrated his competence (2501) by not participating at the front lines, but that is because of reasons that I will disclose to you later. I will tell you in effect that for the purpose between the plaintiffs and these defendants he is practically in the shoes of the defendant Maggiolo.

So the mere fact that he did not participate is no reflection on—or no suggestion that he does not compare with the lawyers who developed the evidence.

I start my charge in this reference of explanation only because the lawyers, both of them, were admonished a number of times, and you should not in any way disadvantage a litigant merely because I admonished a lawyer.

*Charge of the Court*

There are times when the lawyer's zeal is an explanation for violating the orders of the Court and the rulings of the Court and in this case I attribute it to the over-zealousness of counsel. It is regrettable that I had to reprimand counsel in the presence of a jury. I seldom do that. I usually vent my spleen on them outside the hearing of the jury because I want to make sure that the jury understands that no conduct on the part of counsel should reflect unfavorably on the litigants because this is the litigants' case, not (2502) the lawyers' case. The lawyers are just the advocates for the litigants.

In a jury trial, I sit here as an arbitrator. I sit here as a judge of the law. If I make a ruling, even if I am wrong, or if the lawyers think I am wrong, they have the obligation to abide by that ruling. That is the law for this trial. I am the sole judge of the law in this trial.

The jury, on the other hand, is the sole judge of the facts. You must accept the law as I charge it, just as I expect the lawyers to accept the rulings that I make. It lends for stability, because if I interpret the law correctly and I am supposed to do that and I hope I am doing it—and this is the law as lawyers understand it throughout the land—then they know how to prepare their cases, more or less and they know what to expect.

Since you are bound by the law as I charge it, we would expect uniform application, because every jury will be bound by a similar instruction. It is not left to just haphazard guesswork and the jury accepting the law from me would be in the same position as any other jury that is instructed and applying the same law. (2503) Just as you are bound to accept the law as I charge it, so I am bound to accept your fact determinations because you and you alone determine what happened and based on your determination as to what happened, you will arrive at a verdict in this case.



*Charge of the Court*

The case is Robert Elliott and Shirley Elliott against Maggiolo Corporation, Maggiolo Contracting Company, Inc., Maggiolo Foundation Corp., G&A Contracting Corp. and Ronnie Gorr.

You may treat all the defendants as if they were one for those purposes. Of course, a corporation—and I am referring only to the Maggiolo Corporations—are faceless entities. They are not individuals. So when we talk about negligence of the Maggiolo Corporations, when we talk about a charge made by the plaintiff—when I say talk about negligence. I am talking about the charge of negligence—made by the plaintiffs, we mean the conduct of the agents and officers and employees of the Maggiolo Corporation, performed or committed within the scope of their employment. That's the technical legal phrase.

In other words, the acts of the employees while they were in the employ and doing work for the (2504) corporation. So that whether or not Maggiolo is responsible for the injuries claimed here depends on what you find the employees of Maggiolo did, because the employer, the corporation, is responsible for the conduct of the employees, for the acts committed while they were in the employ, during the employment and within the scope of the employment.

The plaintiff claims that while he was lawfully on the highway cleaning a catch basin on Glenwild Road, a falling plank of lumber from a truck owned by the defendant—we will group them all as a defendant even though they are multiple defendants—struck him in the left side of the face, causing the injuries claimed.

Plaintiff claims that the defendant failed to exercise that degree of care which a reasonably prudent individual or corporation engaged in carting away the materials from demolition work would have exercised under all the same circumstances.

*Charge of the Court*

The claim here is that first the trucks were loaded in a fashion and to a height above the box of the dump truck. So that it presented a danger in its travel down the road to the dump, to the plaintiff and others lawfully on the highway.

(2505) The plaintiff's claim is that the defendant failed to exercise the care that you would expect of a reasonably prudent contractor doing that work in failing to take reasonable measures to prevent lumber from falling off the trucks that were carting the debris to the dump.

Proof of what this defendant did with respect to any truck other than the truck the plaintiff claims carried the debris that carried the plank that he says struck him in the face is irrelevant.

The question is, did this defendant load the particular truck to a height and in a manner so that when it traveled along Glenwild Road it was in an unsafe condition and that the defendant should have reasonably foreseen that truck travelling along Glenwild Road would cause the injury in the manner or in substantially the manner claimed by this plaintiff.

Of course, the first question that you will have to determine—and I think both lawyers agreed to this in the summation—is whether the injuries were incurred in substantially the manner claimed by this plaintiff. The plaintiff has the burden of proof on all the ultimate issues of this claim. The (2506) plaintiff must prove by a fair preponderance of the credible testimony; first, the liability issue and that is: Was the defendant negligent in the manner in which it carted away the debris from the demolition site?

As I have said, the first most important issue that you must decide is did it happen substantially as the plaintiff claims. Not precisely. But substantially I mean was the plaintiff injured by a plank that fell off a Maggiolo truck.

*Charge of the Court*

Preponderance of the evidence means that the evidence produced by the plaintiff, when considered and compared with that produced by the defendant, produces in your minds that what is sought to be proved by the plaintiff is more likely so, is more likely true, than not.

The plaintiff must predominate on all the issues in the claim, but as I say, the first issue is the one I just indicated.

If we were to use a scale symbolically and weigh the proof in support of the plaintiff's claim as to how this accident happened on the one side in proof in support of the defendant's position, as against it happening that way, if the scales were evenly (2507) balanced, then the plaintiff shall have failed to sustain their burden of proof. Preponderate means that it is more than, no matter how slightly.

If the scale balance in favor of the plaintiff, no matter how slightly on the issue, then you will find for the plaintiff on that issue. Similarly, the plaintiff must prove that the negligence found if you find the defendant negligently carted away the debris, proximately caused the injuries claimed—and I will define that a little later—and then the plaintiff must prove by a fair preponderance of the credible testimony that he, Robert Elliott, was free of contributory negligence, and then, four, must prove damage, which means the nature, extent, duration of each and every injury claimed.

Evidence is the method by which the law uses to prove or disprove a disputed fact. There are two general classifications of evidence.

One is direct evidence and one is circumstantial evidence. To give you an example of both, assume for the moment that you were a jury sitting in a personal injury case where the plaintiff claimed that the defendant passed a Stop sign without stopping.

*Charge of the Court*

Let us assume that was the disputed issue in the—(2508)  
Let us assume that my Reporter, Mr. Rudolph, and myself were standing at the street corner that was the subject of the litigation. The Stop sign erected there. Assume that he had his back to the roadway and his back to the Stop sign while, I, talking with him, faced the Stop sign directly and faced the roadway directly.

Well, if I were called to testify as to what occurred, I might say that, "I saw the defendant's car travelling at 70 miles an hour. I was talking with Mr. Rudolph. I had the Stop sign in view. I saw the car pass the Stop sign without stopping." That is direct evidence of that disputed issue.

Now, Mr. Rudolph did not see the Stop sign and could not testify directly to that—on that contested issue, but he nevertheless is a competent witness concerning the circumstances bearing on that issue.

He might say, "Well, I was talking to Judge Mishler and through my peripheral vision I saw the defendant's car travelling at about 70 miles an hour. I lost sight of it for about, oh, about a hundred feet and two or three seconds and then I turned to my left and I saw the defendant's car proceeding at the same rate of speed and struck and caused the injuries to the (2509) plaintiff. There we have the circumstance from which the jury might fairly and reasonably draw the inference that that motor vehicle passed the Stop sign without stopping.

So there you have two types of evidence bearing on the same issue.

The law does not hold that one type of evidence is of better quality than the other. It requires the plaintiff to prove all the ultimate issues on the claim charged by a fair preponderance of the credible testimony on both the direct and the circumstantial evidence.



*Charge of the Court*

What is the evidence in the case? The testimony of the witness, regardless of who called the witnesses; the exhibits that are actually marked in evidence; some exhibits, if you recall, were marked for identification. Since they are not marked as exhibits in evidence, you may not see them as part of the record in this case, as part of the evidence in this case.

The portions that were read from those exhibits that were marked for identification, of course, are in the record, so that you may see. The stipulations entered into by counsel; facts of which the Court has taken judicial notice. For example, I took (2510) judicial notice that the 24th of April, 1972 was the Monday of the week. And the depositions that were read to you. It might be helpful for you to understand what is not evidence and what you should not consider.

The statements made by counsel, I asked you at the time to disregard them and I ask you again, pay no attention to what counsel said, except of course in the questioning. Evidence that was stricken from the record. If I said, "Strike it from the record," just as I ask the Reporter to physically strike it from his record, I ask you to figuratively strike it from your minds and recollection, as if it never happened.

You might have heard some random remarks made by counsel. Some of you may have noticed the fine acoustics we have in our courtroom and at times counsel may have said something not intended for your ears but you may have heard it. Just disregard it.

Anything you may have seen or heard outside the courtroom. At times objection was sustained to questions that were asked. You may not speculate on what the answer might have been had the witness been permitted to answer. On the same theory, it is not in (2511) the record.

*Charge of the Court*

You must so discipline your thinking that you will decide this case on the record. That is the way to do a fair and just job. This case, obviously, depends on the credibility of the witnesses that have appeared before you. As far as those witnesses that have come to you through their depositions, their physical presence was absent so you could not note the reactions they had to questions, how they answered questions and all those subtle factors that are present when a witness does appear before you, as one of the lawyer's said, and look you straight in the eye.

But you do have the benefit of the depositions and they are before you. But as far as the live witnesses are concerned, you had the opportunity to observe them. As far as all the witnesses are concerned, including deposition witnesses, you take into consideration the intelligence of the witnesses, the interest of the witness in the outcome of the case, the motive, state of mind and manner while on the witness stand, the extent to which the witness is either supported or contradicted by other evidence in the case.

(2512) Counsel for both sides asked the witness whether on prior occasions they had said anything different than they said to you while they were on the witness stand. This is called impeaching testimony. It challenges the credibility of a witness.

Now, understand that credibility does not refer alone to lying. Of course, if you find that any witness lied under oath before you intentionally as to a material fact, you may disregard all that witness' testimony on the theory that that witness is unworthy of belief.

On the other hand, you may find a reason for accepting a portion of that witness' testimony that you find is credible. That does nothing more than underscore the wide discretion the jury has in weighing the credibility of witnesses.

*Charge of the Court*

(2515) We talk about credibility, we mean more than just lying or intentionally lying. At times a witness hasn't seen everything that he is called upon to testify to and under the urging of counsel, he may testify to certain matters of which he doesn't have a clear recollection or did not have a clear view or did not entirely hear or understand.

So all that relates to credibility. When we talk about prior inconsistent statements, the witness is faced with a statement that he made at a prior time, you take into consideration all the circumstances under which that witness made the prior statement claimed to be inconsistent.

You determine first whether it is inconsistent and secondly, whether it is inconsistent as to a material matter. And third, you decide the effect, if any, that inconsistent statement has on the witness's credibility.

Your good common sense will tell you that a mere variation in retelling what had occurred is not necessarily an inconsistency. You know that if a witness came before you and said the same thing over again, word for word, gesture for gesture and pause for pause, you would have reason to suspect that (2514) witness's credibility.

So there are instances where precise retelling might subject the witness's testimony to a question concerning credibility and there are times when slight variation in the retelling might lend or support the credibility of the witness.

But that is just good common sense and experience throughout your deliberations here in weighing the testimony. That is the best tool we know of for arriving at the truth. This is, in every respect, a search for the truth.

In this case, the defendant has conceded that the plaintiff was examined by Dr. Jack Lissman an ophthalmologist, on November 1, 1974 and Dr. Marks, I think it was Morton Marks, a neuropsychiatrist, on November 26, 1974.

*Charge of the Court*

You may infer from the failure of the defendant to call Dr. Lissman, that were he called, his testimony would not contradict Dr. Henry Gaynin, the ophthalmologist called by the plaintiff.

Similarly, you may infer from the failure of the defendant to call Dr. Marks that were he called, his testimony would not contradict the testimony of Dr. Lawrence Kaplan.

(2515) The defendant has offered testimony through Brian DuBois and Harold Utegg that in May, 1974, plaintiff's counsel of record, Sidney Orseck, had certain conversations with them. The defendants' claim is that Mr. Orseck attempted to obtain false testimony concerning the happening of this accident.

Plaintiffs' counsel has a right and a duty to prepare a case for trial. In the course of that preparation, he certainly should interview prospective witnesses.

That doesn't mean he interviews only those witnesses that will support his claim. He must first find out what the witness will testify to. So there is nothing wrong in Mr. Orseck inquiring as to whether any piece of lumber on any occasion could have fallen from a truck carrying debris.

I charge, as a matter of law, that such inquiry is not an attempt to obtain false testimony. However, if you find that the witnesses told Mr. Orseck that none of the Maggione trucks carrying debris traveled Glenwild Road in the morning passing Frieda's Bungalow on the way to the dump and that Mr. Orseck, through threats, intimidation or other means of pressure or unfair means of persuasion, attempted to (2516) obtain a statement or promise to testify that they drove trucks down Glenwild Road on the morning of April 24, 1972, knowing that such testimony was false, and if you find that such was an attempt to obtain false testimony, then you may infer from such attempt that the plaintiff felt that he had a weak case



*Charge of the Court*

or no case at all and intended to use such false testimony to support a weak case or to establish a baseless claim against defendants.

However, even though you find such attempt to falsify the testimony was made, you may disregard the significance of such attempt or you may give it such weight as you feel it deserves.

In other words, even on such a finding, you are not compelled to make the inference that I said you may make. That is a discretionary matter with the jury.

On the critical question as to how this accident happened, you heard the witness Joseph Shack testify. You heard the deposition of David Utegg and you heard and saw the witness—the plaintiff as a witness.

Of course, the plaintiff and the plaintiff's testimony is to be judged like any other witness. (2517) Take into consideration his intelligence, his motive for testifying, the interest he has in the outcome of the case, just like any other witness.

Now, that is the testimony for the plaintiff on which you will judge how this accident happened. Take into consideration the entire case. But what I want to caution against is in any way crediting the statements made by the defendant to the various doctors and repeated by the doctors on this witness stand as to how this accident happened.

Mr. Sergi: Excuse me, your Honor. You mean plaintiff, don't you?

The Court: Did I make a mistake?

(Read.)

The Court: Oh, no. When I am wrong, I am very wrong. Of course what I want to caution you against is crediting any statements made by the plaintiff or the plaintiff's attorney to any of the doctors as part of the history given to the doctors solely for the purpose of treatment and then repeated on this stand before you by the doctors.

*Charge of the Court*

Just exclude those statements from your consideration when you come to determine how this accident occurred. The mere fact that anybody repeats (2518) outside of court to anybody how the accident happened lends no support to the testimony of the witnesses, particularly to the plaintiff, as to how the accident happened. The same may be said to a limited extent when it comes to determining the nature and extent of the injuries.

In that regard, it may not be proved by the statements that the plaintiff made to his various doctors as to his pain, his headaches and so forth. He sat on the stand, witness stand before you. He told you what his pain was and what his headaches were and what his aches were and what his limitations were.

That was subject to cross examination. That is the fair way. What he told the doctor about his aches and pains and limitation, visual limitation, auditory limitation, physical limitation, were so that the doctor could make a diagnosis and introduced into evidence solely for that reason.

The opinion of a doctor as to the condition of a patient may be based entirely upon objective symptoms, revealed through observation, examination, tests or treatment or the opinion may be based on subjective symptoms alone or on a combination of (2519) both. To the extent that any opinion testified to by a doctor is based on subjective symptoms described to him by a patient, the jury may of course, consider the accuracy of the patient's statements in determining the weight to be given to the doctor's opinion.

Now, normally, a witness may not testify as to what he thinks, may not express an opinion. A witness is called before you to tell you what he or she saw, what he or she heard. An exception is the so-called opinion of an expert.

In this case, the experts were doctors. You need not accept an opinion of a doctor simply because he is called

*Charge of the Court*

an expert. The credibility of his opinion is subject to the same test that any other witness is. You take into consideration his background. Is he well qualified? Take into consideration his opportunity to observe the plaintiff, the extent of his examination.

Use all the common sense tests that you would use in appraising any witness's testimony. A witness because of his background, schooling, training and experience may express an opinion in the field in which he qualifies as an expert.

We have used the word "negligence" and now I (2520) would like to define it. Negligence is the lack of ordinary care. You will note in this definition that the law does not require an individual to be perfect. You may not impose liability on an individual because he is not perfect.

We talk about a reasonably prudent man. What you are called upon to do in determining whether this defendant was negligent is, focus on what this defendant did, what this defendant did as a demolition contractor, who was employed to cart away the materials torn down by him.

As a demolition contractor, you cannot expect that he would take each piece of material and place it very neatly and tie it very tightly in the truck before moving it to the dump.

Perfection is not the test. The test is that of a reasonably prudent man and that is the test of a reasonably prudent contractor under all the circumstances. What have we a right to expect of a reasonably prudent contractor?

(2521) Negligence is the failure to exercise that degree of care which a reasonable prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonable prudent person would not have done under the same circumstances, or

*Charge of the Court*

on the other hand from failing to do an act which a reasonable prudent person would have done under the same circumstances.

The plaintiff says here that a reasonably prudent contractor would not have permitted the truck to leave the demolition site in the manner in which the particular subject truck—and I will call the truck the one that the plaintiff claims did the injuries—and would have taken certain precautionary measures to secure the load that left the site, and that in failing to foresee that the load in that condition could have caused a plank to fall off and injure the plaintiff, it failed to exercise reasonable care.

Now, that's the definition as general as it is. It makes a lot of sense. And that is the standard of care.

Ordinary care is that care which reasonably (2522) prudent persons exercise in the management of their own affairs in order to avoid injury to themselves and to other persons. Ordinary care is not an absolute term, but a relative one. That is to say, deciding whether ordinary care was exercised under the circumstances in this case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

The mere fact that an accident happened standing alone does not, except under the circumstances that I will charge you on immediately, permit the jury to draw an inference that the accident was caused by anyone's negligence. The plaintiff must prove the defendant's negligence by a fair preponderance of the credible testimony.

He may prove this by circumstantial evidence from which negligence may reasonably be inferred.

If you find that the injuries caused to the plaintiff was caused by a plank that fell from one of the defendant Maggiolo's trucks driving along Glenwild Road, and if you find that the truck and the load it was carrying, in-



*Charge of the Court*

cluding the plank, was in the exclusive control of the driver of the truck or (2523) the servants, agents, employees of Maggiolo, and if the circumstances surrounding the falling of the plank were of such nature that in the ordinary course of events it would not have occurred if the defendant having control of the load and the plank had used reasonable care in the circumstances, the law permits, but does not require the jury to infer negligence from the happening of the accident.

Again, if you find the load of debris and the plank were in the exclusive control of Maggiolo's servants, agents, employees and that the circumstances of the accident were such that in the ordinary course of events the plank would not have fallen from the truck if reasonable care had been exercised by Maggiolo, its servants, agents and employees, then you may infer that the defendant Maggiolo was negligent, unless taken into consideration all the evidence in the case you conclude that the accident was not due to any negligence on the defendant's part.

Just as Maggiolo was required to exercise care for his own safety or the safety of his agents and employees and for others including the plaintiff, so (2524) the plaintiff was required to exercise reasonable care for his own safety.

That is the same degree of care that a reasonably prudent person would have exercised for his own safety under the same circumstances.

The law does not permit you to weigh the degree or fault of the plaintiff and the defendant. It requires that if you find that the plaintiff was guilty of any negligence, that your verdict—and that that negligence contributed to the happening of the accident, your verdict will be for the defendant even though you find that the defendant was also negligent.

If, however, you find that the plaintiff did exercise reasonable care under all the circumstances, and again, it

*Charge of the Court*

is not as to perfect man that foresees everything. The plaintiff is bound by the same standard of care to act as a reasonably prudent person-man under all the circumstances as a man, as he claims, was lawfully on the highway.

If you find that he was cleaning out the catch basin and performing that kind of work.

If, however, you find the plaintiff did exercise reasonable care under the circumstances as (2525) you find them to have been at the time and place of his injury, plaintiff was free of negligence, and provided you find the defendant was guilty of any negligence, then your verdict must be for the plaintiffs if you find that the negligence of the defendant proximately caused the injuries claimed.

An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result of or reasonably probable consequence of the act or omission.

Now, the charge on damages: My charge to you on the law of damages must not be taken as any indication as to how I feel about the case. I have no opinion as to whether you should find for the plaintiff or for the defendant. I charge you on the law of damages because if you reach the question you should know the law on how to assess the damages recoverable.

Of course, if you find that the plaintiff has (2526) failed to prove by a fair preponderance of the credible evidence that the defendant was negligent, or you find that the plaintiff himself was negligent, which negligence contributed to the happening of the accident, then you don't reach the question of damages.

But if you find in favor of the plaintiff on those issues and you find proximate cause, then you must consider how much the plaintiff is entitled to recover.

*Charge of the Court*

The damages are never punitive, you don't punish a defendant because you find the defendant negligent. Damages are compensatory. You reimburse the plaintiff or plaintiffs. You make the plaintiffs whole in money for the damages he suffered—talking about Robert Elliott—and she suffered, Shirley Elliott.

We have two types of damages. One is special damages and the other is general damages.

And then we have two time elements in damages. One is the injury to date and prospective injury, the injury in the future. So keep all of those classifications in mind.

The plaintiff is entitled to recover all the (2527) special damages, the money out of pocket to date, the wages he lost, which I think Mr. Edelman computed to be about \$18,000, if you find that that's what he lost.

All of the medical expenses, the doctors' bills, the hospital bills.

I have a number of items that where the defendant agreed that these moneys were paid without agreeing that they were necessarily incurred as a result of the accident. You must find that these losses were as a result of a probable consequence of the injury, that he wasn't able to work.

Of course, the plaintiff has a duty to minimize these losses, particularly when it comes to wages. If he can, he must make an effort to take employment. And whether he made an effort is a fact question for you. Whether he was able to work at all is a fact question for you.

In determining his ability to work, you must take into consideration all the limitations that were placed on this plaintiff by reason of this accident.

Loss of vision; if you find it so, the extent of the loss of vision.

(2528) Auditory loss; the extent of the auditory loss, whatever damage you find he suffered.

*Charge of the Court*

Headaches he suffered as a result of some brain damage.

The loss of his teeth.

All that, take that into consideration and you determine whether the plaintiff is employable, whether he could fairly compete with others for the same job because that's really the test. And then if you find that he suffered the loss of wages, it's really the loss of the power, the ability to work. Then you compensate him to date for the amount that you find he lost.

Now I come to these items and I think I roughly figured them to be some place around \$3700. And the defendant conceded these monies were paid, without conceding the reasonable value or necessarily incurred as a result of this accident.

And they had Dr. Innerman, \$42.71; Vassar Bros. Hospital, \$456; Community Hospital, Liberty, \$121.30; Dr. Praeger, \$81; Dr. Scilleppi, \$853.50; St. Francis Hospital, \$86.45; Dr. Russell, \$7.50; Sherwise Pharmacy, \$70.73; Dr. Clapper, dentist, \$2,000; Sherwise Pharmacy, \$11.95; and another bill (2529) from the pharmacy of \$6.95.

Now, if you find that those figures are fair and reasonable and that they were necessarily incurred as a result of the accident, then, of course, he is entitled to reimbursement for that sum. That's one item.

The other item being loss of wages.

Now we come to the other item, pain and suffering. Pain and suffering mean more than just the headaches that he felt, if you find that he had the headaches, or the dizziness that he had. They include limitation on his normal activities; his inability to sleep, his inability to have a normal relationship with his children, his inability to have a normal relationship with his wife, his inability to carry on the usual activities, if they were sports, an inability to drive a car, or the limitation on driving a car. All that is part of pain and suffering.



*Charge of the Court*

We all recognize it is not easy to place a dollar value on it. But you have that obligation. And you fix a sum that you feel will fairly and justly and fully compensate this plaintiff for all the pain and suffering he endured to date.

(2530) Now we come to the future. Well, the plaintiff must prove by a fair and reasonable tolerance of the credible testimony the extent—where it is—how badly—the extent of the loss of hearing, the extent of the loss of sight he has and then duration for how long. It is permanent? How much of the injury is permanent?

Now, of course, if it's permanent injuries, then you should determine how long the plaintiff is likely to live. We don't know how long he will live. He may leave the courthouse and unfortunately some unforeseen and unfortunate thing may happen to him and that may terminate his life. Or he may live to the biblical 120. But we give you as a guide solely as a guide, life expectancy tables based on the Bureau of Vital Statistics information.

And a male, age 30, is expected to live for 41 years.

(2531) Now, you determine how much longer this plaintiff will be forced to submit to the pain and suffering. And, again, you compensate him fully and fairly for the pain and suffering you say he will have to endure until the time that the particular impairment or injury has been repaired. Or if you find it permanent, to the rest of his life.

How about his loss of earnings? Well, he's not expected to work as long as he lives. So you take into consideration, well, in his occupation how long would a man employed in that type of work, labor work, be expected to work? One figure suggested by the Bureau of Labor Statistics is about 30 years.

Now, in compensating the plaintiff for future loss of wages—this refers to only loss of wages—you should not give him today the same dollars amount as you would

*Charge of the Court*

give him for his loss of wages, let's say, in 1990, because money received now is worth more than waiting the 16 years to get it. So we have what we call a discount table. Just to give you an idea of the value of money paid now for a loss in the future, I will give you these figures.

If you received one dollar a year over the period of ten years, that ten dollars if discounted at (2532) six percent would be worth \$7.36 today. If you were given one dollar each year over a period of 20 years, that sum discounted at six percent would be worth \$11.46 or 47 cents. If you were given one dollar a year over a period of 30 years, that \$30 discounted at six percent would be worth \$13.76.

Now, at 5-1/2 percent, that same \$30 paid a dollar a year over 30 years would be worth \$14.53. You see, at 6 percent it would only be worth \$13.76, and 5-1/2 percent, \$14.53. That same \$20 at 5-1/2 percent would be worth today \$11.95, discounted at 5-1/2 percent. 6 percent, it would be worth less; it would be worth \$11.46. So at 10 years, a dollar a year paid over a period of 10 years discounted at 5-1/2 percent is worth \$7.53, and 6 percent, \$7.36.

Now, that is the way you would fix damages for the plaintiff Robert Elliott. The plaintiff Shirley Elliott has a separate claim. It's derived through her husband's claim. It's dependent on the success of the husband's claim. If you find that the plaintiff Robert Elliott is not entitled to a verdict, then Shirley Elliott cannot sustain her claim. It's derivative. But it's separate nevertheless.

In effect, what Shirley Elliott is saying is (2533) that as a result of the negligence of the defedant her relationship with her husband has been disrupted, changed and damaged. The relationship between her and her husband has been damaged in that he was a mild, placid man.

*Charge of the Court*

Now he is very difficult to get along with. It creates a certain tension. They used to go out together. They don't any more. The usual disruptions that would occur if you find Robert Elliott was in the emotional and depressed state that was described. And so you compensate her for the loss of comfort and society of her husband to date. And, again, take into consideration how long it will last in the future, the loss in comfort and society of her husband that will be incurred in the future.

There is one item of damages that I left out. And as you see in the main I have just an outline and sometimes I overlook these things and forget them. But the plaintiff is also entitled to recover the reasonable value of future medical or surgical services that can reasonably be expected to be incurred. The one I can think of is the possibility—and you find that if it's a probability—reasonable probability of the removal of the fibrous tissue in his cheekbone.

(2534) Now, having charged you on the claim and what the plaintiff has to prove to recover, how to deal with the evidence, how to assess credibility of witnesses, I would like to instruct you on how you arrive at a verdict. Each one must decide the case for himself and herself. The verdict must be unanimous. During the course of your deliberations you may send a note through your foreman, and all notes will come through your Foreman, asking for testimony or exhibits. I will not send any exhibits in unless you ask for them. If you want them all, I will send them all in. If you want specific exhibits, I will send in specific exhibits. If you want to hear testimony, try to identify the witness or the subject matter or both. It may take a little time complying with your requests. We must go through the transcript to find it. And as soon as I find it I will call you into the courtroom and read it to you.

*Charge of the Court*

Your job is to sift through the evidence, confer with your associates, to go over the evidence and only the evidence in arriving at a verdict. Don't arrive at a verdict and disregard the arguments of your associates. The jury process is a deliberative process. It's an exchange of ideas. It's improper for (2535) anyone to come into the jury room and say that well, they would just go along with anything that anybody else says. You're abandoning your function. You are violating your oaths.

On the other hand, it's just as improper to take an intransigent view and refuse to talk to your associates.

The litigants here, both the plaintiffs and the defendants, regard this as a very important case. Don't think that the defendant regards it any less because he is a corporation. He's entitled to the same fair treatment as the plaintiff. Everybody is treated the same in this court. Individuals, Governmental agencies, corporations, in this court everyone stands of equal height.

Reject all pleas to sympathy. They don't belong in a courtroom. They interfere with your fair judgment.

You are to decide this case on the evidence and in accordance with the charge and free of all bias, prejudice or sympathy.

If the plaintiff has sustained its burden, the plaintiff Robert Elliott, in such sum as you feel will fully, fairly and justly compensate him for all the (2536) damages he has to date and for all the damages you say he will have in the future. The same goes for the plaintiff Shirley Elliott.

Now, I ask you to take leave of the courtroom. Don't start your deliberations yet. I want to have some discussion with counsel.

(Whereupon, the jury retired from the courtroom.)

\* \* \*

(The jury thereupon returned to the courtroom at 11:25 a.m.)



*Exceptions to Charge*

The Court: I mentioned the figure of \$18,000 as loss of wages to date. I didn't in way way intend that you be bound by anything that I said. You will determine how much this plaintiff lost in wages. I just recalled that figure hearing Mr. Edelman say it in summation. But apparently there are other items that he claims in addition to the money he received in salary. You determine how much money he lost. Will the clerk please swear in the Marshals.

(Marshals sworn.)

**Exceptions to Charge.**

Mr. Edelman: Thank you, your Honor.

Your Honor, I respectfully except to those portions of your charge where you stated that this is the manner in which any other trucks were loaded is irrelevant because of the testimony that all of the trucks were substantially loaded the same way.

(2537) Mr. Edelman: Your Honor, I respectfully except to that portion of your charge where you had stated in substance that the jury may not credit in any way any of the statements made by the plaintiff to the doctors or any of the history given by the plaintiff to the doctors or the hospital, particularly basing my opinion upon the *Licht* case, and that is that 29 A. D. 2d 565, 286 New York Supp. 2d, 307, and also *Toll against the State of New York*, 32 A. D. 2d 47, 299 New York Supp. 2d, 589, and the other cases previously cited, that the history in a hospital record is admissible for the purpose of diagnosis or treatment.

And I think as part of the same charge it is stated that it lends no support to the testimony of the witnesses of how the accident occurred.

*Exceptions to Charge*

Now, I also respectfully except to that portion of your Honor's charge that says that the defendant can't be expected to tie the materials down.

I also respectfully except, as I did before, on the charge of contributory negligence. It is our contention that from the evidence that there is no evidence of contributory negligence.

I also respectfully except to your charge that there was an \$18,000 loss of wages. According to our computation we have—the testimony is that he was (2538) earning \$150 a week. And in addition to that he earned additional overtime in the wintertime, time and a half, for cleaning snow. In addition to that, he worked for his father-in-law fixing cars and also doing farm work. That they received free food for the family and also free rent.

In reference to the 30 years work table, work capacity, may I—I was wondering if I can impose upon your Honor to look at the chart. And, I don't know, but it seems to me to be out of line where there is a 10 year differential between work life and longevity because generally I have noted that it is five years generally instead of 30 years.

Those are the only exceptions, your Honor.

The Court: If I said that he lost \$18,000 in wages, then I will tell them it is what they say. I got the figure from summation. I realize there are others. But I will tell them about that.

Everything else is denied. Go ahead.

Mr. Sergi: I have no exceptions or further request, your Honor.

Mr. Edelman: I have some requests, your Honor.

As far as my request, your Honor, I respectfully ask your Honor the charge that the plaintiff had a superior right on the highway. And it was his right (2539) and duty to be on the highway pursuant to his work as set forth in my memorandum of law and request to charge.

*Exceptions to Charge*

And in addition to that I respectfully request your Honor to charge that the failure to call George Maggiolo, who was the president of the corporation, and who according to the testimony was there on various occasions, they may draw the inference of that failure just like similarly the failure to call the doctors.

And also I respectfully ask your Honor to charge that—

The Court: How about the failure of Mr. Orseck to take the stand when he was in court to deny the charges? Do you want me to charge both?

Mr. Edelman: I will withdraw the request.

May I also respectfully request—

The Court: I am just surprised that Mr. Sergi did not refer to it and so I decided not to say anything about it. But if you urge me, I will do that.

Mr. Edelman: I do not urge you, your Honor.

The only other request is the question of the charge of inflation or erosion of the dollar.

The Court: One of our judges had the answer. He said what you ought to do is guarantee that you keep your money in the bank and not put it in gold or (2540) goods. Inflation is never properly charged. But I do not want to get into any discussion on that.

Bring them in.

(The jury thereupon returned to the courtroom at 11:25 a.m.)

The Court: I mentioned the figure of \$18,000 as loss of wages to date. I didn't in any way intend that you be bound by anything that I said. You will determine how much this plaintiff lost in wages. I just recalled that figure hearing Mr. Edelman say it in summation. But apparently there are other items that he claims in addition to the money he received in salary. You determine how much money he lost. Will the clerk please swear in the Marshals.

(Marshals sworn.)

\* \* \*

**Verdict.**

(2572) The Court: We have a verdict.

The Clerk: Note from jury marked Court's Exhibit 7.

(So marked.)

(Jury present.)

The Court: Mr. Foreman, would you please stand. I have your note saying that the jury has arrived at a verdict.

The Foreman: Yes.

The Court: In the case of Robert Elliott and Shirley Elliott against the defendants named, how do you find, for the plaintiff or for the defendant?

The Foreman: For the plaintiff.

The Court: And in the case of Robert Elliott against the defendants, how do you find, in what amount?

(2573) The Foreman: \$350,000.

The Court: And in favor of the plaintiff Shirley Elliott against the defendants, how do you find?

The Foreman: 28,000.

The Court: Thank you, you may be seated.

Juror No. 2, you heard the verdict.

Is that your verdict?

Juror No. 2: Yes, your Honor.

The Court: Juror No. 3, is that your verdict?

Juror No. 3: Yes, your Honor.

The Court: Juror No. 4, is that your verdict?

Juror No. 4: Yes.

The Court: Juror No. 5, is that your verdict?

Juror No. 5: Yes.

The Court: Juror No. 6, is that your verdict?

Juror No. 6: Yes.

The Court: Juror No. 7, is that your verdict?

Juror No. 7: Yes.

The Court: Juror No. 8, is that your verdict?

Juror No. 8: Yes.

The Court: Juror No. 9, is that your verdict?

Juror No. 9: Yes.



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The Court: Juror No. 10, is that your verdict?  
(2574) Juror No. 10: Yes.  
The Court: Juror No. 11, is that your verdict?  
Juror No. 11: Yes.  
The Court: Juror No. 12, is that your verdict?  
Juror No. 12: Yes, sir.  
The Court: And so say you all.  
The Jury: Yes.

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**Proceedings on Defendants Maggiolo's Motion for  
Adjournment.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

United States Courthouse  
Brooklyn, New York  
November 22, 1974

Before:

Honorable Jacob Mishler, U. S. D. J.

(3) The Court: What's the problem?

Mr. Sergi: Your Honor, on behalf of the defendant Maggiolo, I must make an application for a continuance beyond Monday. One of the witnesses I intended to call at the trial of this action is presently in the hospital, and I wish to wait until he's released from the hospital because his testimony is very urgent to the defense of this action.

The Court: What will he testify to?

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Mr. Sergi: Well, may I offer your Honor an affidavit and I request it be read in camera, then if your Honor decides, I must show it to all counsel, I will do that.

The Court: How can they argue against it without seeing it. No, I won't read it.

Mr. Sergi: Then, I'll give it to counsel.

The Court: Give it to counsel and let them argue it. I don't see any problem.

Mr. Sergi: Pardon.

The Court: This fellow you are talking about is the plaintiff's witness, right?

Mr. Sergi: Yes.

The Court: And you say that he won't come into Court and they'll try to use his deposition instead.

(4) Mr. Sergi: No, I'm afraid your Honor has not completely understood my affidavit. I am stating to the Court in my affidavit that Dave Utegg was an employee of my insured.

The Court: Yes.

Mr. Sergi: Whose deposition was taken by the plaintiff in this courtroom.

The Court: Yes.

Mr. Sergi: I'm stating to you that he has indicated that he wishes to recant his testimony.

Now, he cannot do that while he is in the hospital.

The Court: Why is he arranging for the operation just at the time when he knows he's supposed to come to Court? If he wants to come into Court to recant—

Mr. Sergi: Perhaps he's not controlled by me and therefore this opportune time to be in the hospital was suggested by someone else.

The Court: All right. Did he undergo the operation, yet?

Mr. Sergi: This morning, I'm sorry, yesterday. We called the hospital yesterday.

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The Court: Do you know anything about this?

Mr. Edelman: Absolutely nothing, your Honor.

The Court: Those are serious charges, if (5) what Mr. Sergi says is true, when this case is over, if the evidence warrants it I'll just send it to the United States Attorney's Office and vigorously prosecute it.

Let somebody go to jail. I'm the sentencing judge. I believe somebody should go to jail for a reasonably long time to deter any of this business. But those are just allegations.

Mr. Sergi: Your Honor, I make no frivolous allegations. I'm here with a very serious matter and I am here, your Honor, trying to properly defend my client—

The Court: When will he be out of the hospital?

Mr. Sergi: The operation was performed yesterday. The operation, he'll be in the hospital we understand for four days. He'll have a convalescent period for about a week. So, we have two weeks.

The Court: Which hospital is he in? Is that in Pennsylvania?

Mr. Sergi: Scranton, Pennsylvania.

The Court: Where does he live?

Mr. Sergi: In Scranton, Pennsylvania. That's why I ask for a special subpoena.

The Court: How far is Scranton from the courthouse?

(6) Mr. Sergi: Beyond a hundred miles.

The Court: How can I get him here?

Mr. Sergi: You have the power under that particular section of the CPLR, your Honor. If you issue me a special subpoena, I will have it served on him by a marshal and then he will have to come here on the power of that subpoena.

You have that power under the particular section which I cite in my affidavit.

The Court: Under CPLR?

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Mr. Sergi: Federal rules of civil procedure. 45 Sub-division E.

The Court: That's the way I read the statute, nothing new in it. I didn't understand this gives me special power with the statute, like an antitrust suit gives me the power. I may issue subpoenas beyond a hundred miles? Did you ever have a judge issue a subpoena?

Mr. Sergi: In the Watergate case they have issued special—

The Court: In a criminal case.

Mr. Sergi: Yes.

The Court: In a criminal case I can issue it for any place, even in a territory and they say that even in a foreign country where it's a citizen of (7) the United States.

But that's a lot different in a civil case. I don't know whether we don't have the authority to issue a subpoena anyplace in the nation, but not in the civil case. That's the limitation.

Mr. Sergi: He responded to previous subpoena when he came here to be deposed.

The Court: Let me say this: He may come voluntarily. That's something different.

Mr. Sergi: He will not come voluntarily for me at this time.

The Court: There is another way to do it. Then, you can—all right, took his deposition?

Mr. Edelman: Yes, your Honor. On the compulsion—

The Court: Take it again where he recants. Under Rule 45—

Mr. Sergi: I have the same problem. I must serve him with a subpoena to get him in here to take his deposition.

The Court: All right.

Mr. Sergi: He can recant. But I would like him in the courtroom, your Honor, because under the—



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The Court: I'd like him in the courtroom, too.

Mr. Sergi: Under this—

(8) The Court: But I can't get him in the courtroom under Rule 45. I disagree with your interpretation. I thought there was an amendment passed last week when Congress wasn't busy with Watergate and Mr. Rockefeller.

Maybe they put another amendment through not on that statute. I am limited to 100 miles.

Mr. Sergi: Will your Honor allow us to try to get him deposed and attempt to get him to recant that matter?

The Court: I will do more than that. When this case is over I don't care which way the case goes, in the light of your statements, I'll put everybody on the stand including every lawyer, investigator, and I'll have a criminal investigation of Mr.—

Mr. Sergi: David Utegg.

The Court: Under criminal investigation, he'll come in and answer before a grand jury.

Now, that's the way to handle that. But that can't happen until after the trial.

Mr. Sergi: May we at least have the opportunity to wait until he's out of the hospital and tell him exactly what you're—

The Court: Yes. You can convey those words. If he doesn't come in, even if he does come in to this (9) trial in light of your statements, if there's anything to support it, he will be brought before a grand jury to give the full version of what happened. Perjury is one of my favorite subjects.

Mr. Sergi: Your Honor, there is another way we can do this if I may suggest to your Honor. In view of what I have told the Court, will you entertain a motion to squash the deposition *de bene ess.*? That way, whoever wants this witness here will then bring him into the courtroom to use testimony.

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The Court: That wouldn't be fair. Suppose all your allegations are baseless? And this plaintiff has been deprived of this witness' testimony solely on the basis of your representations and they turn out to be wrong.

Mr. Sergi: If your Honor please, if he came out here once pursuant to a subpoena, which was not a valid one. Since he was outside the 100 mile limit ordered to support the plaintiff's position at that time, if the deposition *de bene esse*, is now squashed, he will again be recalled upon by the plaintiff to do the same thing in an open court.

The Court: How much will you pay if the plaintiff is unsuccessful, if your guess is wrong?

Mr. Sergi: How much will I pay?

(10) The Court: That's right. In costs, how about \$5,000? Will you be willing to pay \$5,000 if I have to declare a mistrial and then start all over again?

Mr. Sergi: I don't know. I'm thinking about it seriously. I don't believe I will pay the \$5,000. I will be—my client will suffer pretty severely and they will have to pay the great damages here to the plaintiff if he's successful and I am wrong.

The Court: The plaintiff may suffer and lose his case because you guessed wrong and they couldn't get him here voluntarily, and if everything you say is true, it's going to be a difficult thing to prove. If they got that kind of control they'll just say don't come in.

Mr. Sergi: That's the problem.

The Court: So, away we go. The answer to all of this is criminal prosecution and believe me, I'm ready for it, because I'm fed up to here with witnesses getting on the witness stand and telling the wildest stories. I'm not referring to civil cases because I haven't had too many. But I've had it up to here in criminal cases and I've got an out for it. And each time I find a defendant

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or witness on the stand that tells an outrageous lie that's obvious, I try to impose some kind of penalty.

Now, you haven't been reading too many criminal (11) cases because you're only interested in civil cases. You read United States against Hendricks and you'll know what I mean. I gave the defendant two extra years because he lied. That's the way I feel about it I just can't stand to tolerate that. That goes for both sides, I don't care who it is. So there you have it.

Now, you prove it and I'll give you all the support you can get and I'll give you—

Mr. Sergi: Your Honor, will you allow me an opportunity to get this man to come in here or depose him?

Mr. Edelman: Your Honor, may I be heard?

The Court: I don't have any time after this week. I have a heavy criminal calendar after this week. The only reason I have this week is because two criminal cases understand, are pleading out. That I would have had available.

I don't know why it took you so long to make those charges. My office called you and said, we're ready for trial. And so, you come in with this affidavit.

Mr. Sergi: Your Honor, we have been working very hard on this case. We have been trying to get this Dave Utegg to come down to this courthouse. (12) Strangely enough, my investigator sent me a letter, a report that came in yesterday morning before your Honor's secretary advised me that I would be going to trial Monday. Which states, do not be surprised if Dave Utegg is in the hospital when this case is called to trial. Now, he went to the hospital the day before yesterday.

The Court: I didn't call you until yesterday.

Mr. Sergi: Called me yesterday, okay.

The Court: But he went to the hospital day before. How did he know? I didn't know.

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Mr. Sergi: This is what's happening. The man's been jumping back and forth now. He goes to the hospital just at the time I need him.

The Court: Now, Mr. Sergi, that argument falls of its own weight. Because I'm telling you that I didn't know until yesterday that the criminal cases were going to plead out. I didn't tell my girl to call you. Did you get a call before yesterday to tell you to come in on Monday?

Mr. Sergi: No, your Honor.

The Court: Wasn't it yesterday that you called to tell me that Jeffrey was pleading out?

The Clerk: Yes, sir.

The Court: We were supposed to have a criminal (13) trial on Monday. He couldn't have known it. Maybe adding one and one up and getting three.

Mr. Sergi: Your Honor, would you like to see the report I have?

The Court: This letter is sent to you, November 14, telling you he's going into the hospital on November 20.

Mr. Sergi: It arrived yesterday.

The Court: But the letter sent to you November 14, telling you he's going to the hospital.

Mr. Edelman: A letter?

Mr. Sergi: Letter dated November 14, which came in yesterday.

(14) The Court: Had nothing to do with setting it down. He didn't go into the hospital because this case was sent down for trial for Monday; that's clear. Oh, sure, it was the investigator that suggested that's what he would do and he seemed to be—

Mr. Sergi: Clairvoyant.

The Court: That had nothing to do with it. Whatever else there is to your case that has nothing to do with it.

Mr. Sergi: This case will take two weeks to try.

The Court: I was told four or five days.



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Mr. Edelman: As far as my case is concerned, I am going to put only on one witness and a plaintiff possibly, a second one. That's the entire case on liability as far as injury is concerned. Also, I expect to be able to curtail that. If it's not unduly delayed, I expect to be able to get done with my case easily, two days.

Mr. Sergi: I have six witnesses.

Mr. Edelman: The six witnesses, your Honor, all of them ought to be able to be done within two hours. The six witnesses I have been advised are the employees of the trucking concern that's going to get (15) up and say, no, I wasn't there, I didn't see the man. Or, I wasn't doing anything. That's all their testimony could be, six witnesses.

Mr. Sergi: I'm not going to reveal my case but there are more than the six employees that I intend to bring.

Mr. Edelman: Your Honor, this case—

The Court: I don't know how you can keep a case a second in federal court. I don't know how you do this. Federal courts, the plaintiff knows almost everything about defendant's case and defendant knows almost everything about plaintiff's. The only thing you didn't get is the fellow to recant and they probably know that.

Mr. Sergi: I sent Mr. Edelman a letter indicating the names of the witnesses I intend to call in this trial. Mr. Edelman has sent me a letter—

The Court: Where do the witnesses come from?

Mr. Sergi: Woodrich, Sullivan County, within a hundred miles.

The Court: We can serve any employees within the State of New York, no matter how far it is.

I was wondering if everybody came from Pennsylvania, I'd love to send this to Pennsylvania.

Mr. Sergi: They're all in Sullivan County.

(16) The Court: Sullivan County isn't Pennsylvania: it's still New York. I can't give you a date.

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I'll give you an adjournment without a date and in the meantime, do all your investigating of any evidence of criminal violation.

Mr. Sergi: It will be here.

The Court: Just bring it in.

Mr. Sergi: I have it. It will be here.

Mr. Edelman: Your Honor, may I be heard?

The Court: Sure.

Mr. Edelman: The statements in this affidavit are without foundation. No. 1, they stated that "In the first time in May 1974, Maggiolo was still in the dark as to this particular claim. The suit was for two years a suit when a man was very seriously injured. They had investigators all over the lot at that particular time. Police reports, the whole bit, it was all laid out. Then when it came to the testimony of them producing anyone who had any knowledge of this thing, they refused to produce anyone. Then, I ask for the Plaintiff, took the deposition of Mr. Eutag as a witness. Under compulsion, your Honor.

Then after this examination which was in July 1974, after that, first, they made a motion to remove it from this court. Then, they went through the motion (17) to remove this from this court. Then the examinations were held. An examination apparently went against them and then they renewed the application before your Honor to remove this to the Southern District and that failed.

After that failed, then they went to the other alleged pretrial discovery. And whatever he wanted, I continually was in touch with Mr. Sergi. Whatever you want to complete your case, I will give it to you. As a matter of fact, the—on November 16th they stated they wanted another physical by a Dr. Marx. We don't even get an appointment. We give—got the appointment yesterday

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for today for 1:00 o'clock. Mr. Sergi told me yesterday he had another pretrial discovery proceeding and I asked him what was it all about. He was able to tell me when it was all over the fact that Dr. Marx hadn't examined him. The rest was all secret. In reference to the procedure in this court, the procedure before your Honor, in all federal courts, this should be the place for the revelation of the truth. As far as this alleged fraud for the first particular time, the first time I know anything about it, is when the—when he brought it out today and he intended to do this in camera. We know nothing about Eutag's going into the hospital. His position, as (18) your Honor well knows, the first time we knew anything about this situation possibly getting a trial, I have been trying to get a trial here for a period of nearly a month and a half. Every time I call Mr. Sergi, he's always busy. There is something else that takes preference to this thing. And then your Honor, the first time we knew about it was yesterday afternoon.

Mrs. May called me and then I called Mr. Sergi. And then I also called Mr. Burtives' office and told them the fact there is a possibility of going on on Monday before your Honor. I said we are ready, we insist upon being ready. We have been ready already since way back in the early part of this year, ready for trial. Trying all this time to get somewhere in order to get a trial.

This particular alleged fraud is I respectfully submit to your Honor, if he had any real fraud the least he should have done, not only revealed it to me, but revealed it to the United States Attorney's Office and say, here where they're attempting this crime is being committed, let them know about it. Lay it out on the table. I think it's—if there's anything what I know about the case, what this defendant, not Mr. Sergi, but others in his behalf, what his investigators are trying to do, I'm

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well aware of (19) their pressures and what they're doing in trying to twist arms. It makes anything that we have ever done at any time look a little completely—I'm not casting any aspersions on Mr. Sergi whatsoever.

We are ready for trial and have been ready for trial. I can try this case in two days easily as far as plaintiffs are concerned.

The Court: Well—

Mr. Edelman: He will have all his rights. Criminal action, whatever else. We're willing to go ahead and proceed under your Honor's direction.

The Court: There is a very, very slight possibility I can try this case the week of December 16. I've got criminal cases before it. You can keep that in mind but as I said, I'd be surprised if it went to trial. Once it gets to January 6th, I can tell you that I've got important criminal trials that must be tried and I don't know how the calendar is going to look for February or March.

But I'm not putting any civil cases down for those months. They'll be tried when I find that my criminal calendar has fallen apart. Now, that's the story.

Mr. Edelman: Your Honor, why can't we try it on Monday?

(20) The Court: Because he's made a serious charge here and I want to give him every opportunity to bring in Mr. Eutag; that's all there is to it. If it wasn't as serious a nature as was represented, I wouldn't bother with it. But I'm as interested now as the parties are of seeing Mr. Eutag testify.

Mr. Edelman: Your Honor, do you know what an easy thing—that can be done. That we have and we can go ahead on this thing on Monday from now to Monday, we can go ahead. We will go to Seranton and I will go to him and let him re-depose him. Take him to Seranton even though he has no legal right, no legal power, I'm willing to go there voluntarily enter into an



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order of deposition and take his deposition. The man he says was operated on. He's in closer contact than we have.

The Court: I don't know whether it's feasible. Just went under an operation, cataract operation.

Mr. Sergi: Yes, your Honor.

The Court: I don't think he can move his head for—I don't know how long.

Mr. Sergi: At least two weeks.

The Court: Two weeks, can't move his head? Two weeks?

Mr. Edelman: It's a few days. And we can do (21) that easily.

The Court: If you can do it I'll sign an order so ordered, but it will have to be by stipulation. Call the hospital to see whether it's feasible.

Mr. Edelman: Let's call right now. Maybe we can go ahead on Monday.

Mr. Sergi: Since Mr. Edelman is being that gracious about going up to Pennsylvania, if Mr. Edelman will tell this Court that he'll have David Eutag here in this courtroom Monday, I'm ready for trial.

The Court: How can he do that if you say that he isn't able to testify for two weeks?

Mr. Sergi: If he wants to go and take his—

The Court: What's the sense about talking about the impossible? We're talking about the possible. It's possible to take his deposition. Again, if you wanted to do that—

Mr. Sergi: I want to make every effort to get him here in the courtroom.

The Court: All right.

Mr. Sergi: There is a different attitude in a witness in a deposition outside the courtroom than there is in the courtroom, and your Honor knows exactly what I'm saying.

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Mr. Edelman: Your Honor, I think a call to the (22) hospital now may be able to go ahead and reveal whether or not he can—

The Court: Mr. Edelman, I'll keep you in mind if I can bring it on some time in December, I will. If between now and Monday you and Mr. Sergi can get together. If you find that the information is wrong, that he hasn't been operated on, for example, yesterday. You sure he was operated on?

Mr. Sergi: Yes, sir. I called the hospital.

Mr. Edelman: Can we hold this subject to telephone call?

The Court: It's held subject to anything else I have to do. I have no other case on Monday, come in and try your case. I love to work.

Mr. Edelman: This is what I want to do.

The Court: I want to do it, too.

Mr. Edelman: This is what he's stalling. He's pushing the day of reckoning away on every type of excuse. Now, it's fraud.

The Court: Listen, that's as good an excuse as any I have heard. A fraud has been committed on the Court and a lawyer wants some time to prove it. One of the ways he wants to prove it is by bringing the man into court and testifying before me.

Now, that can be accomplished and I'll wait (23) two weeks to see the unveiling fraud, if it's possible.

Mr. Edelman: I would like to wait. I would like to see the unveiling of it. See where the fraud is.

Mr. Sergi: Give me an opportunity to try, at least.

The Court: Adjourned without date. I expect the lawyers to be ready on twenty-four hour notice. If the lawyers are ready on Monday, this Monday, if they can overcome the problem, then I'll be glad to start the trial on Monday. If I'm not trying that case. If I'm available I'll try it.

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Mr. Edelman: Your Honor, I cannot arrange it without your Honor's assistance with Mr. Sergi.

The Court: I won't order him under these circumstances to get ready for Monday.

Mr. Edelman: Your Honor, your Honor can hold it, say, for twenty minutes and let me make a telephone call?

The Court: Sure.

(24) Mr. Edelman: Let me see what the position is of this man.

The Court: All right.

Mr. Edelman: I'll call the hospital and try to find out. Can you tell me where he is? Where in Scranton?

Mr. Sergi: Your Honor, I'm impressing upon the Court—

The Court: Isn't it in that affidavit?

Mr. Edelman: No. Only says "Hospital in Scranton."

The Court: What's so wrong in telling him where he is?

Mr. Edelman: "Scranton, Pennsylvania." I'd like to find out whether or not this is—where in Scranton, what hospital? What his physical condition is and if he went in on the 20th. If he went in on the 20th, it's impossible that he be operated on the same day on a cataract operation without a pre-surgical work-up. Then, Scranton—

Mr. Sergi: When I get back to my office—

Mr. Edelman: Let's do it now.

Mr. Sergi: Wait a minute, whatever information I have regarding where this hospital is and the name of the hospital, but I urge on the Court as I have stated, (25) I want an opportunity to bring this man in here alive. That's what I want. I don't want—

The Court: You think his life is in danger?

Mr. Sergi: No. I think that if we're going to depose him he may do the same thing he tried on the first deposition. I want him here facing the Court and jury.

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The Court: I thought you meant that there was a danger.

Mr. Sergi: I'm not suggesting anything of the sort. I want him in the court, before the Court, to tell his story.

The Court: Let's take one thing at a time. Give Mr. Edelman the name of the—

Mr. Sergi: As I get back—

The Court: I'll hold it for twenty minutes.

Mr. Edelman: He won't give—

The Court: He said he's going to give it to you. \*

Mr. Edelman: Could you call your office?

The Court: You're not summing up, Mr. Edelman. He said he's going to give it to you. Don't refuse to—

Mr. Edelman: I didn't hear him.

The Court: You heard it.

Mr. Sergi: Name of the hospital, Moses (26) something, Scranton Hospital. That's all we know.

Mr. Edelman: I will make the call now and I'll report back.

The Court: If you can bring him in alive for Monday, let me know.

(A short recess is taken.)

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Mr. Edelman: May I, for the record, your Honor, state that the time is twenty to eleven. It's my statement that the—Mr. Sergi or someone on his behalf tried to impose a fraud upon the Court.

Firstly, I spoke to, I called the witness, David Eutag at the Moses Taylor Jay Hospital in Scranton, Pennsylvania; telephone number 717-346-388, he's in Room 244. I spoke to him personally and he advises me he is to be



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released from the hospital on Monday. In addition thereto, to make sure that I called his doctor, Dr. Scantino, telephone number 717-342-1283, and talked to Dr. Scantino personally and he stated he would be released Monday at the latest Tuesday. That he had a removal of a lens, the other lens was removed some time I think in April of 1974.

The Court: Now, he's not blind, this was the left eye that was removed?

Mr. Edelman: Mr. Eutag told me that the (27) testimony that he gave under oath as a witness was totally true. That he never told anyone that he's going to recant and that they have been attempting to presume him cant and that they have been attempting to pressure him and his family for weeks at a time.

In view of those statements, in view of the violent statements made or the accusations made, your Honor, I respectfully submit there is an imposition or fraud on the Court, and your Honor can easily speak to Mr. Eutag himself at the hospital. He's available and he can be spoken to to verify what I told you is correct. There has been nothing shown, nothing stated by Mr. Sergi to make up his statements. As a matter of fact, yesterday afternoon when I called Mr. Sergi pursuant to Mrs. Mayer's telephone call, I asked him whether or not he can be available for trial. And at that particular time, I asked him whether or not, whether he can be available for trial and he said no. He'd rather adjourn the matter and I said why? He says, I haven't completed my pre-trial discovery proceedings. And the only statement was that when it was all done that Dr. Marx has not examined; that's a doctor they appointed on November 16, 1974. And at no time indicate to me that there was any degree of fraud or any other position whatsoever. He also told

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me and (28) I'm stating this for the record that he was compelled, he's willing to go to trial on Monday if he will come in and testify.

The Court: Well, Mr. Eutag can come in and testify.

Mr. Edelman: If it's humanly possible for us to get Mr. Eutag to come in here to testify, we will bring him here.

The Court: What did the doctor say?

Mr. Edelman: The doctor told me as far as he is being released Monday or Tuesday, if everything goes right. Within a day or two thereafter, he will be available to travel. And therefore, your Honor, in view of the fact that these, the statements that he was going to be in a week or two is without foundation, and in view of the charges made and it's directed at somebody either myself or Mr. Orsek or somebody on our behalf, I think that the least that should have been done is tell your Honor upon what that was based. Either to us or to your Honor directly.

And your Honor, I think there is no possible reason, legal reason, why this case should not proceed. During the trial, at any time, your Honor has a right at that time to either to declare a mistrial if you think in the interest of justice or either to hand it (29) to the United States Attorney's Office if Mr. Sergi wants. I'll go down to the United States Attorney's Office now to see whether there is any basis for his charges. But to go ahead and use this as a basis to get away from the day of trial and knowing your Honor's calendar situation, knowing that the fact that he's been attempting to stall this case way back in the early part of this year, to avoid a trial. We have tried to get a trial; he had another excuse. I think your Honor, there is an imposition upon the Court and it's a fraud upon the Court. Your Honor, the statements are not true and Mr. Eutag stated to me that they

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are not only—his testimony is correct, he had no intention to recant it, no matter what pressure put upon him.

The Court: Now, this case is on for trial Monday marked ready. In the meantime, I want you to get a statement from the doctor or at least be prepared to put in an affidavit of your own, when Mr. Eutag will be ready to travel. Tell me whether or not he's ready to appear in court voluntarily and it will be helpful if you took a deposition of Mr. Eutag as to what happened. Ready for Monday before we pick a jury with or without Mr. Sergi's consent and cooperation.

(30) If he wants to go there and cross examine, fine. If he doesn't, take his deposition on the matters contained here.

Now, if I'm satisfied on Monday that Mr. Sergi's claims are baseless and Mr. Eutag is ready to come to court to testify, then I'll proceed without questions.

Now, that's again forecasting that the criminal case will plead. So, come in on Monday and let's see what there is further in the mystery story.

Mr. Edelman: No. Your Honor, I am, for the record, I am ready to go to Meranton at any time. Let Mr. Sergi—

The Court: Now, Mr. Sergi is not ready to go with you. I expect you to go yourself and I expect you to take a deposition.

Mr. Edelman: I will.

The Court: A full deposition and don't feed the witness the questions, please. Just tell him what happened. I know the Edelman type of question.

Mr. Edelman: I will go ahead and present it exactly as your Honor stated for my own protection.

The Court: All right.

Mr. Edelman: Honestly.

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Mr. Sergi: Do I understand now, your Honor—

The Court: You are ready to try the case on (31) Monday.

Mr. Sergi: I just want to get clear in my mind so there'll be no mistake.

What Mr. Edelman represents to the Court is that I represented to this Court a bugaboo. I stated the man was in the hospital. There is no question that he's in the hospital. I stated to the Court that he was there for an operation cataract, no question he was. We were advised by his mother-in-law that he might be there for a week or more. That's the representation we make to this Court.

The Court: You said "two weeks."

Mr. Sergi: A week or more, which is two weeks. I would not make an application for an adjournment on this matter if I didn't firmly believe my position that if I had this man in this courtroom, he would recant.

Mr. Edelman: Your Honor, he is—

Mr. Sergi: Let me finish, Mr. Edelman. I let you finish. You owe me that much.

I think—I point no fingers. I make a statement to this Court that from information I have that's been given to me that this man intended to recant. He has fascinated, changed his mind many times.

Now, to state to me or state to this Court that (32) Mr. Edelman or Mr. Orsak spoke to him over the phone, he assured them he would adhere to his prior testimony. He appraised me of the opportunity of bringing him in this court and having this Court listen to the testimony of this man in an open court. That's what I hoped to do.

The Court: No, there is another way.

Mr. Sergi: Directing me to go up and sit in a deposition with Mr. Edelman as we did before and have him



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reiterate what he stated before is not representing to this Court the true facts of this case.

The Court: Now, wait, let's go to the trial. Let's assume everything you say is so. Let's assume in the final analysis, Mr. Edelman reads the deposition. You can bring all the witnesses that he said he lied about when he made the deposition and have him testify to this jury, and tell the jury that he told them that he lied; that's all.

You are both talking probabilities. Why don't you both go over there and both of you face the witness and let him tell both of you, either that he intends to recant or that he doesn't? That he lied or that he didn't. Now, I am not interested in that particularly. I am interested in what his condition is.

(33) Put on the record his version of what happened to this point on both sides trying to get him to testify. Whether money was offered to him, either promises were offered to him or ask him about the matter that you have.

Now, Mr. Edelman doesn't know about the letter of your investigator and I didn't—I won't reveal it to him. But why not have your investigator there? Let him deny the investigator ever said it. Now, you'll have something for the trial.

Mr. Sergi: What your Honor is suggesting is what I have been trying not to do, is reveal my proof before this trial starts and that's what you are asking me to do.

The Court: That's most unfortunate. Everybody would like to get as much as he can of his adversary's case and not reveal a single thing about his own. That's not the way cases are tried. Let me tell you something: The best way to reveal a fraud is to have both sides know what the other claims. And get so that each one knows

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the proof that the other has and let them come before a judge or jury and put it all on the table. Not one version; not one incident.

Now, I can understand where witnesses trying to be nice to both sides, that could happen here. I (34) don't know. But you have a way of attacking the credibility of Eutag. If he made all those statements on any number of occasions to a trained investigator, have the investigator here to tell the jury he's a liar. That's the way to do it.

Incidentally, you do it anyway. If he came here and told his original story, wouldn't you?

(35) Mr. Sergi: He is here, your Honor. I can do it. I'm afraid I may have an evidence problem. If he's not here I can't confront him, see.

The Court: No, you can. Now, in another deposition, Mr. Edelman offered you another deposition. Say, at trial, didn't you tell so-and-so this and this. If he says, no, then bring the so-and-so here to say he most certainly did. Now, your witness is here, live before the jury and is ready to testify and your case is ready for presentation to the jury. You can point to the jury, to Mr. Edelman's representation, he be here, three, four days, and that time already past when he's refused to voluntarily appear here. That's powerful medicine, isn't it?

Mr. Sergi: Well—

The Court: You can turn that around very easily if it's true.

Mr. Sergi: I am afraid if I made a statement like that, Mr. Edelman would strongly object. Would say to the Court, I have no control over this witness. Your Honor, he can't make that statement.

The Court: Now, look. Mr. Edelman represented this witness said, he'd be out of the hospital Monday and

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that he or his doctor said that in three or four days he'd be able to travel or maybe one or two days. (36) You made that statement.

Mr. Edelman: That's correct. That's what he stated.

The Court: This witness, are you ready to permit Mr. Sergi to say to the jury the representation was this witness would be able to travel here by Thursday?

Mr. Edelman: I have no objection to that, your Honor. The only thing I will state is that exactly what the witness told me, what the doctor told me. That he is, being released Monday, the witness told me the doctor says Monday or Tuesday that he expects to be able to travel in a few days thereafter. If all things are equal—

The Court: I want it definitely in some affidavit on Monday exactly when he'll be able to travel. I want Mr. Sergi to be able to say this to this jury if Mr. Utegg doesn't appear here. Here it is, he represented he'd be here, on that basis I have my case here, a witness, he's a liar. Mr. Utegg must be a liar because he won't come here voluntarily. Now, you wanted—

Mr. Edelman: Your Honor, has the power.

The Court: I don't know if I have the power. I want your consent to say that.

(37) Mr. Edelman: Well, your Honor, I can only state that the witness told me what the witness told me, what the doctor told me. I cannot predict at this particular time beyond that.

The Court: All right. You better be able to predict with some degree of certainty on Monday because that may be the grounds for an adjournment then.

Mr. Edelman: I will go up on this examination and I will expect to be up there tomorrow.

Mr. Sergi: What time do you want to go up there, Mr. Edelman?

*Opening by Mr. Edelman*

Mr. Edelman: I will make a call now and find out what time tomorrow he will be available for an examination, and I will let his Honor and Mr. Sergi know, know when he may be able to do that. The exact time I will try to arrange.

The Court: Tell him this is at the direction of the Court.

Mr. Edelman: At the direction of the Court.

The Court: And both of you want to be there when Mr. Edelman—

Mr. Sergi: No, I certainly—

The Court: Both lawyers are going to be there.

Mr. Edelman: Right.

The Court: He's going to be sworn.

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**Excerpts From Transcript.**

(54) one of the rare instances where prior consistent statements are permitted.

Mr. Edelman: That is correct.

The Court: But not at this stage. It is not always admitted and I may not allow it. It may not be a challenge of that nature that the defendant is making.

Mr. Edelman: Then I stand corrected.

The Court: But the point is that I make a ruling and you ignore it. You know, you have a track record with me. You do very well in the final result but if you get it you're going to get it fairly, Mr. Edelman.

Mr. Edelman: I am trying.

The Court: You may be trying in your own peculiar way.

You are trying to win and you couldn't care how you go about it and I won't allow it.

I make a ruling, you abide by it.



*Opening by Mr. Edelman*

Mr. Sergi: On behalf of Maggiolo, I move for a mistrial on the ground that the jury has been contaminated by Mr. Edelman in his opening statement that the doctors in the history have supported the plaintiff's position and he has done it again and (55) again and he then apologizes to the Court which doesn't correct the situation that this jury now has in their minds that doctors who examined and treated this plaintiff both at their office and in hospitals have histories that sustain the plaintiff's position and confirm his description of the accident. I say, it is incurable. We cannot remove that from the jury's mind by Mr. Edelman's apologies to the Court.

The Court: Well, first, I will accept Mr. Edelman's version of what the history shows. If it shows no more than a piece of lumber falling from a truck and striking him in the face, that doesn't show any liability at all. I thought it showed that the truck was improperly loaded, that the speed at which the truck was going would indicate negligence. What he said so far, if that is all it showed—

Mr. Edelman: May I show it to your Honor?

Mr. Sergi: I am not saying that.

I am saying without further description of any history by any doctors, this jury has heard not once but twice if not more, from Mr. Edelman, that the doctors have confirmed the manner in which the plaintiff said he was hurt—the manner in which Mr. Edelman says the plaintiff says he was hurt; that he was cleaning out a catch basin, a truck was driving (55a) by and something flew off and hit him in the left side of the face and he says the doctors in the history confirmed that.

The Court: May I see the history?

*Colloquy*

(56) Mr. Sergi: I have histories. I don't know which one he handed to you.

He referred to Dr. Cosentino:

"Mr. Bob Elliott was brought into this office because of injuries sustained when a log or plank fell off a passing truck and struck him in the face. He was cleaning the cover of a catch basin on the Woodridge-Glenwild Road when the accident happened."

Now, how much more can a doctor say to mouth the position that plaintiff has now described to this jury?

The Court: I can think of a lot more—that the truck was improperly loaded; that there was a log at the top—

Mr. Sergi: I am saying at this moment, without testimony, Mr. Edelman said that the plaintiff will prove that this truck was overly loaded driving down Glenwild Road, the plaintiff was minding his own business doing his own work in a catch basin and the doctors will confirm what the plaintiff said.

How much will be confirmed is not known.

I say, because of this, this jury's mind and position has been contaminated with prejudice against the defendant and I move for a mistrial.

The Court: The motion is denied.

(57) I will try to correct any false impressions.

Mr. Sergi: I don't know how.

The Court: Well, you listen.

Mr. Sergi: I listened to the Court's admonishment to Edelman and it meant nothing.

The Court: That's something different. The refusal of Mr. Edelman to abide by the Court's ruling is another ground, and that I will do regardless of prejudice.

Seat the jury.

(58) (Jury entered jury box.)

The Court: Ladies and gentlemen, when a doctor expresses an opinion on the stand before you or when he makes his diagnosis, he assumes certain facts with relation to the injury.

*Colloquy*

For example, if somebody comes in with a bruise on the head, he may assume that the person fell, something struck him or he bumped into something.

In order to make a proper diagnosis, he asks the patient certain questions because his diagnosis may be different if it happened because the individual just bumped into something, than if he was struck by a force.

Now, you have a right to know the basis upon which the expert expresses an opinion.

When somebody goes into a doctor's office, the doctor says "well, tell me how it happened."

Now, it may or may not be accurate, but for the doctor's purposes, it suffices.

For example, in this case, if the doctor is told that the plaintiff was struck in the face by a board that fell off a truck, he might diagnose the case differently than if the plaintiff told him that somebody accidentally slapped him in the face.

You will determine, if you find that the (59) plaintiff was injured, how the plaintiff was injured, if the doctor expresses an opinion based on assumed facts different than you find.

In other words, if he was told it happened one way and you find it happened differently and that finding is material to the diagnosis, then you might very well, and I would charge you at the proper time, that you must disregard the doctor's opinion because the doctor assumes certain facts.

He does not know what you are going to find. He doesn't have an adversary proceeding with contested evidence to make a finding. He must assume that the patient is telling the truth.

So, when the doctor comes in to testify and he says, "This is the history," he is not telling you, and you have no right to believe that that is the way it happened. You will find how it happened from what the plaintiff tells

*Colloquy*

you happened, what the defendant and lay witnesses say happened, and that is how you determine liability.

So, at this moment, because of the improper remarks that Mr. Edelman made concerning the admissibility of that history to establish liability or fault, I am giving you this extended charge. Wait until the evidence is in to determine how it happened

\* \* \*

(114) Q. Was there any warning of any kind that this board would come off, come flying off, or come off this side of the truck?

Mr. Sergi: Objection to the form of the question. He used the word flying. It was never used by this witness.

The Court: Please rephrase it, Mr. Edelman.

Mr. Edelman: All right.

By Mr. Edelman:

Q. Was there any warning given to you of any kind that this board would become flying—would come off the side of the truck and hit you in the face?

\* \* \*

(582) Mr. Edelman: Your Honor, at this time, I offer the hospital record, pursuant to agreement, or Robert Elliott at the Community General Hospital, Liberty Division, showing treatment on 4/24/72.

The Court: Any objection, gentlemen?

Mr. Sergi: No objection.

The Court: Let it be marked.

Mr. Sergi: No objection, except to history, your Honor.

The Court: The hospital record is admitted into evidence, the history is excised from the record.

Mr. Edelman: May I show your Honor the history?



*Colloquy*

The Court: Sure. There is nothing in it to change my opinion at all.

Mr. Edelman: All right.

\* \* \*

(775) The Court: I'll excuse the Jury for a moment.  
(Jury out.)

The Court: Mr. Edelman, if you persist in asking witnesses about history, as you did twice with this witness, I'll entertain a motion for a mistrial.

Mr. Edelman: I'm not going to ask any more questions at all.

The Court: Well, don't ask any other witness (776) whether that witness heard Mr. Elliott tell the hospital, a doctor or anybody else how the accident happened.

The purpose is obvious: you are trying to prove liability through inadmissible proof.

Seat the Jury.

Mr. Fetell: And treatment.

The Court: And treatment.

\* \* \*

(822) The Court: That's enough, because you see I know what you're trying to do. We might as well be open and frank about it.

Mr. Edelman: Yes.

The Court: You want to show as many histories as possible, and that each time he said it was a board and not a branch.

Mr. Edelman: That's correct.

The Court: You're not interested in offering this to show that it was necessary for medical treatment, you want to show that he was hit by a board, on the liability question.

It has nothing to do with the treatment, and I won't allow it.

\* \* \*

*Dr. Henry Gaymin, for Plaintiff, Cross*

(1037) The Court: I sat Mr. Fetell down when he started objecting. One lawyer to a litigant and I have enough trouble with that.

Incidentally, Mr. Edelman, when I reprimanded you and when the doctor agreed, you just threw the paper down and looked at the jury as if to say, "See, I told you."

You look at a jury and get affirmations and confirmations and agreement from the jury.

I know some of it is part of you, and it started. I'm sure, when you began to practice law (1038) but if it becomes too obvious I am going to sit you down.

. . .

(1062) The Court: I don't think it's necessary. The doctor said so. I don't think the document itself may be offered in evidence to prove it. I think it's still carrying the advice of offering it to the jury for the purpose of showing prior consistent statements. That's the obvious purpose of the plaintiff. It's just a brazen attempt to prove liability by repeated histories given to Vassar doctors in the hospital. I don't think it ought to be permitted.

Mr. Edelman: Respectfully except.

The Court: There's only one reason you want that in. There's no question about it. That's not the way to prove liability.

Mr. Edelman: I think, your Honor—

The Court: I'm going to give a strong charge on that in view of the plaintiffs' efforts and partial success, too.

. . .

*Irwin Mewmark, for Defendant Maggiolo, Direct*

(1068) Q. Did you place the mechanism of the accident on that hospital record? A. Yes.

Q. What did you place on the hospital record on the day of this occurrence at about one o'clock in the afternoon?

Mr. Sergi: Objection.

The Court: Objection sustained.

Q. What does the hospital record state?

(1069) The Court: Objection sustained.

Q. All right. Is the history that is in that hospital record in your handwriting? A. The diagnosis portion is in my handwriting, and my signature here. The history was written by the nurse.

Q. All right. In the history does it state the manner in which this—

The Court: Objection sustained. Don't ask that question again, Mr. Edelman. I ruled on this a number of times.

• • •

(1127) The Court: The jury may be excused.

(The jury thereupon retired from the courtroom.)

(The following occurred in the absence of the jury.)

The Court: If I find you are making needless objections solely for the purpose of disrupting the examination I will say so before the jury. The objections are repetitive. There is nothing new about them. I have already ruled on them. You have the right to cross examination. And on all matters you objected to, they can be brought out on cross (1128) examination and you know it. Now seat the jury.

*Irwin Mewmark, for Defendant Maggiolo, Direct*

(The jury thereupon returned to the courtroom.)

The Court: There is one thing I would like to add. Will the lawyers come up to the side bar?

(The following occurred at the bench between the Court and counsel.)

The Court: Apparently you don't take orders easily, Mr. Edelman, and if you persist in it I will declare a mistrial and you can start all over again before another judge.

(The following occurred in open court.)

\* \* \*

(1173) The Court: You didn't like his questions, did you?

Mr. Edelman: I didn't like the word "contractors" that's all, the showing—

The Court: The objection was, "I object on the ground that it's improper in form."

That isn't the way your objection was made. You started your usual speeches about what you didn't like about it.

Mr. Edelman: I object to the word "contractors."

The Court: All right.

You object to the word "contractors" which was the wrong way to make objection.

Mr. Edelman: It certainly wasn't frivolous.

The Court: In my humble opinion, it was, but on the theory you did it in good faith, it was improperly made.

Mr. Edelman: That, I can't argue with, your Honor, but certainly not frivolous, and certainly, —and I don't make frivolous objections.

The Court: I disagree with you. I think it was frivolous. I think it was solely for the purpose of disrupting the examination. That's the way it (1173a) appeared to me.

\* \* \*



*Irwin Mewmark, for Defendant Maggiolo, Cross*

(1254) Mr. Edelma: Your Honor, may the witness stay outside while we are having this argument?

The Court: Yes.

Will you please take a position outside the courtroom?

(The witness then left the courtroom.)

Mr. Sergi: Your Honor, I am going to object to any photographs to show the condition of any trucks at any time other than the morning of this occurrence, on April 24, 1972, up until 12:00 o'clock noon, which is the time when this Plaintiff said an accident occurred, between 8:00 o'clock in the morning until 12:00 o'clock noon.

The Court: How do you intend to use these photographs.

Mr. Edelman: To show that these are the usual methods that they loaded, and both on notice, and both on improper conduct.

The Court: How do you have notice of an act of negligence, where the injury doesn't result from a condition?

Why do you have to show notice?

Mr. Edelman: Your Honor, one of the acts of negligence is improper loading, and if we can show that this is (1255) the usual method of their loading, then the reasonable inference—

The Court: Wait, wait.

You hop from one thing to another.

Why do you have to show notice of the condition.

Mr. Edelman: I don't have to show—

The Court: That is what I want to know.

Mr. Edelman: I don't have to show it.

The Court: Now, what about the negligence ground, why are you going to ask this question?

Mr. Edelman: That this is the customary and usual way of loading every day, including the day of this occurrence.

*Irwin Mewmark, for Defendant Maggiolo, Cross*

The Court: Suppose he says he doesn't know of any custom or practice, can you still use these photographs?

Mr. Edelman: If he denies knowing the custom and practice, not actually having seen it, I can't use them.

The Court: All right, call the witness in.

I won't allow you to use it as a gimmick—

Mr. Edelman: I am not using it as a gimmick.

The Court: Come on in, Mr. Newmark.

(The witness then retook the witness stand.)

The Court: Go ahead, ask the questions.

\* \* \*

(1257) The Court: 95 percent of your questions, Mr. Edelman, were leading questions, as a matter of fact, many of them sounded like summations, the entire argument.

I overrule the objection, because leading questions I find, shorten the trial, but it hasn't worked this way in this case.

\* \* \*

(1319) Mr. Sergi: Excuse me, your Honor, may we have these photographs—unless they are in evidence—turned over?

The Court: Yes.

Mr. Edelman: Your Honor, these (indicating) are in evidence.

Mr. Sergi: They are not in evidence, those are not in evidence (indicating).

Mr. Edelman: You are talking about these, yes.

(Mr. Edelman then put them further away from the jury on the table.)

The Court: Turn them over, please turn them over face down or put them in an envelope.

*Irwin Mewmark, for Defendant Maggiolo, Cross*

They are not in evidence, they shouldn't be before the jury.

Mr. Edelman: All right.

\* \* \*

(1370) The Court: The jury may be excused.

You'll ask outside the hearing of the jury.

(Jury leaves courtroom.)

The Court: I want to put it on the record.

It's purely argument to me. Put it on the record. If Bob Elliott—go ahead.

Mr. Edelman: Your Honor, before I asked the question I wasn't going to do that. That's a gentleman in the back there—

Mr. Sergi: I have no idea who he is.

Mr. Edelman: I don't know if he's connected with this case. I would like to have his name for the record.

The Court: Do you care to give your name?

A Person: I'm just an observer.

My name is Nheld.

The Court: I might say, Mr. Edelman came into my chambers yesterday, almost hysterical, talking about somebody who is preparing defense witnesses and I refused to discuss it with him but it also struck me as being strange why a lawyer thinks it's so important to keep witnesses out of the courtroom when we have transcripts, particularly.

There's no limitation on the use of a (1371) transcript.

Mr. Sergi: Just a minute. Might I make a comment about that, your Honor?

I know all of this is superfluous, but I have no objection to Mr. Edelman having his assistants here, his son here; Mr. McGuire, who works for Mr. Orseck was here.

*Irwin Mewmark, for Defendant Maggiolo, Cross*

I have no objection. I'm making my statement.  
Mr. Orseck, please, stay out of this.

Mr. Orseck: I haven't said a word.

Mr. Sergi: You're about to.

I may have another comment.

The Court: There's so much in-fighting, gimmickery, manipulation in this case that it's shameful. I'm trying to give both sides a fair trial.

You find it almost impossible to face a witness.

Whenever you have a point to make and you think it's an important point, you tell it to the jury.

You don't care what the witness says. I want to hold you to the lectern. I might do that.

Mr. Edelman: I'll try to stay there.

Mr. Sergi: I would like to make a further objection. Mr. Edelman insists on making a summation with every question. Your Honor has stopped him many (1372) times and has admonished him. In spite of the admonishment, he insists and continues to do that.

I would like to hear the rest of the question that he just started.

The Court: Yes.

\* \* \*

(1373) The Court: I don't care what it is. Let's assume it is.

Mr. Sergi: That's what he'd like him to say. The other if, if he grabbed by the headlight, wouldn't streams of blood—

The Court: You're asking this witness to testify to what he saw, heard. It's not an attack on credibility.

It's trying to bring before the jury your version of Bob Elliott's testimony and nothing else.



*Irwin Mewmark, for Defendant Maggiolo, Re-cross*

Mr. Sergi: Absolutely.

The Court: Whether it's accurate or not.

\* \* \*

(1432) (The following occurred in the absence of the jury.)

The Court: Are you finally ready? Can we proceed with this case? Let's go.

You know, I have other work to do, Mr. Edelman. I have other cases to try. This isn't the only case I have for the rest of my life. Let's get on with it.

I thought I had problems in criminal trials. This is impossible.

I should have tried liability alone. That would have done it.

Mr. Sergi: That's why I suggested it.

The Court: I thought it was a little unfair, but it is difficult to be fair with you, Mr. Edelman.

Mr. Edelman: Your Honor, may I approach the witness while I ask questions from this (indicating)?

The Court: Surely, but make sure you face the witness and not the jury.

Mr. Edelman: I will.

(1434) The Court: Face the witness, Mr. Edelman. I'm not going to tell you that again.

Mr. Edelman: All right.

Q. Did you?

The Court: Wait.

Mr. Edelman: I'm sorry.

The Court: When a lawyer is on cross examination he should be directing the questions to the witness. He should not be making speeches to the jury. It is improper.

*Joseph Diaco, for Defendant Maggiolo, Cross*

I have warned Mr. Edelman any number of times on that and I won't tolerate it any more.

\* \* \*

(Jury present.)

\* \* \*

(1448) Q. At any of the other sites, while you were cruising around as you say, did you observe any demolition going on at any of those sites that morning? A. No.

Mr. Edelman: I respectfully—

The Court: On what ground, Mr. Edelman?

Mr. Edelman: Because this is directly contrary to what he testified.

Mr. Sergi: Oh, God, what does—

The Court: Strike that. This is Mr. Edelman's (1449) version his recollection of this witness' testimony.

It is your recollection that counts. And the statement is improper. If he wanted to make a statement he was advised to ask that the jury be excused and then make the argument.

Go ahead, Mr. Sergi.

\* \* \*

(1512) Q. And these were for every single day you were on this job, is that right? A. That is correct.

Q. Those records would reveal, would they not, what your men would be doing that morning, would they not?

The Witness: Would you repeat what you just said?

Q. It would reveal what type of work or where they were working that morning or that day? A. Yes. It would tell you where they were working.

Mr. Edelman: All right, I now call for the production of the progress records.

*Joseph Diaco, for Defendant Maggiolo, Cross*

Mr. Sergi: The progress records I have, your Honor, have been supplied to Mr. Edelman and have now been introduced into evidence.

And that is all I have and he knows it.

He has asked me several times.

The Court: The jury may be excused.

(The jury thereupon retired from the courtroom.)

The Court: The records you are talking about (1513) are records other than the records that were just introduced showing what they do.

The Witness: Yes, there is a daily report that I make up.

The Court: Do you say they were introduced?

Mr. Sergi: Your Honor, in response to interrogatories propounded to this defendant many, many times, I have provided Mr. Edelman with several copies—copies of several records in response to his interrogatories.

The Court: Are those the reports that you are talking about?

Mr. Edelman: Absolutely not. He is talking about daily reports, progress reports, what they did that day, where they were working, and who was working and doing what.

But what they have given us is a trip ticket and the people who were working,—it is nothing to do with the progress records.

Mr. Sergi: Why don't you find out if we have them instead of making a demand?

Your Honor, I move for a mistrial. He has done it repeatedly in front of this jury. He demands records that I do not have.

(1514) The Court: Are you serious about that?

Mr. Sergi: I am serious.

*Joseph Diaco, for Defendant Maggiolo, Cross*

The Court: What have you got to say about that?

I am ready to grant a mistrial.

Mr. Edelman: Your Honor, I asked—

The Court: Are you serious?

Mr. Sergi: I am serious about it. He is not going to get away with it.

The Court: I can tell you some things that aren't on the record, the mugging of Mr. Edelman that Mr. Sergi has not seen.

Now Mr. Edelman doesn't know how to try a fair case, and that's the answer.

Why do you make a demand for the production of records before the jury after warning you not to do it?

Mr. Edelman: Your Honor, I thought it was perfectly proper to ask for the records. This man said they made them. We haven't got them.

The Court: The only reason you asked for it in front of the jury was because you felt that Mr. Sergi didn't have them. Right?

Mr. Edelman: No, I thought maybe they would (1515) produce them, or if he didn't have them, at least make an explanation for it. I thought I had a right to do that.

Mr. Sergi: Ask him if he in his interrogatories has not asked this defendant for progress reports and that I then provided him with everything I have?

Mr. Edelman: But these are not progress reports, what he has given me.

The Court: How do you know that they are not the reports the witness is talking about?

Mr. Edelman: Because they are only trip tickets. Let me show you, your Honor.



*Joseph Diaco, for Defendant Maggiolo, Cross*

Mr. Sergi: How do you know that they are not the only records I have? Ask him. Don't ask questions in the abstract.

Mr. Edelman: Your Honor, may I show you the records that have been given us?

Mr. Fetell: These are office copies of the interrogatories, your Honor.

The Court: When you talk about daily progress reports—

The Witness: This is one with the date on it.

These are the code numbers.

(1516) The Court: These are the progress reports?

The Witness: Right.

These are code numbers that tells what you are doing that day. We have a regular code sheet and we put these numbers here and then say how many hours we put in.

The Court: Did you give them to Mr. Edelman?

Mr. Sergi: I certainly did.

The Court: Did you get these?

Mr. Edelman: Yes, your Honor, but that is not what this man said. He said he had a daily record.

The Court: Why don't you ask him whether he means these records?

Mr. Edelman: I will ask him now.

The Court: Why didn't you do that before you demanded production of the reports?

Mr. Edelman: I thought it was another record.

The Court: No, it is because that is the way you try a case.

Mr. Edelman: I am sorry. I apologize, then.

The Court: I don't know. I would love to teach Mr. Edelman a lesson.

*Joseph Diaco, for Defendant Maggiolo, Cross*

(1517) Mr. Sergi: Well, I wish you would because I am serious about this demand. He has contaminated this jury.

Mr. Orseck: No—

Mr. Sergi: Just a minute, Mr. Orseck. I am talking about Mr. Edelman to this Court.

Mr. Orseck: I am not interfering. I haven't said a word, Judge. I am the attorney of record and I won't say anything, but I don't want him raising his voice and pointing a finger at me.

The Court: You were ready to say something. It is Mr. Edelman's conduct that I am talking about.

Mr. Orseck: All right, Judge.

The Court: And I am sick of it. I can tell you that.

Mr. Sergi: Your Honor, I want to make a comment for this record. This jury has been contaminated not only with innuendos but improper questions, summations, mannerisms, improper demonstrations, demands of counsel which questioning counsel knows I don't have. He is doing it only for one reason, to impress this jury that I am holding back records.

Now, I can't do anything with this jury now (1518) that they have been contaminated like that. I seriously move for a mistrial. We can't try a case fairly in the manner in which Mr. Edelman is conducting the trial. I don't know what I can say to this jury after what has been going on. For the last 6 or 7 days the same thing has been going on. He has been admonished repeatedly and repeatedly and he still does it. In the sense of fair play, I don't know what else I can do. I have tried to refrain myself from doing anything improper.

*Joseph Diaco, for Defendant Maggiolo, Cross*

but I must respond in kind. I don't want to do it. It is improper. It is not fair.

The Court: What have you got to say about that?  
(1519) (The following continued to be heard in the absence of the jury:)

The Court: What have you got to say about it?

Mr. Edelman: Your Honor, if that is the conduct that I am guilty of, I apologize. I will not do it. I was not consciously aware of it. I honestly thought that this man stated on direct examination—if you will listen to the question and the answer—that he made daily progress reports. The daily progress report of what work was being done, where it was being done, who did the work, and so forth. The records that I have is not daily progress reports. It is not a progress report at all. I have two records that have been supplied to me, by the way, and one of them is a trip ticket which your Honor—

Mr. Sergi: Which is in evidence.

Mr. Edelman: Which is in evidence.

And the other is the amount of hours worked by the individual. It doesn't, in any way, show where the work was being done, how it was being done, who did what and when.

I also took an examination of Mr. Maggiolo.  
(1520) And Mr. Maggiolo said that there was progress records. I assumed that the progress records and the daily work records are entirely different records than were given to me, with the honest assumption that this is it and that there are such records and that there may be such records, particularly in view of the fact in the last examination of the last witness, your Honor, there was a record—of Mr. Newmark—there was a record that Mr. Sergi had of a record made on

*Joseph Diaco, for Defendant Maggiolo, Cross*

the day of the occurrence, which I had no knowledge of and no way of ever finding out until it was brought out at that particular time.

I thought maybe Mr. Sergi may have another record or progress record that would be more definitive. It was an honest attempt, nothing more than that, to ferret out that information, and that is the reason why—it may be laborious—I am sorry—but that is my trial method of going from—

The Court: Oh, yes, that is just what I am talking about.

Mr. Edelman: Well, I know of no other way but to pinpoint time to time to time because you see otherwise—for instance, like we found out—(1521) another thing for the record—I asked in interrogatories whether there was any statement ever taken by any of their employees.

They said no.

Was any taken by any other witness?

The answer was no.

The first time I had any idea that a written statement was taken was—Mr. Newmark—was when I asked for it today.

Mr. Sergi: When did we answer the interrogatories and say no?

Mr. Edelman: Your Honor, may I be heard, your Honor?

Now, also my investigation revealed, and that according to our speaking to Mr. Newmark, that Mr. Newmark had given a previous statement to the representative of Maggiolo. And that was the reason when we interviewed Mr. Newmark, he stated he wouldn't give any statement to us because he had given a previous statement to Maggiolo and he wanted to see what they stated. That was never produced, your Honor.



*Joseph Diaco, for Defendant Maggiolo, Cross*

In view of that background, I honestly thought—  
(1522) The Court: Isn't the testimony clear that he gave one statement that all that happened was that possibly two other investigators took notes as to what he said?

Mr. Edelman: Well, that is what he testified to here.

Mr. Sergi: Why don't you confront him with it?

Mr. Edelman: Wait a minute. With what? That he told us the fact that he said he gave a previous statement?

The Court: Who did he tell? Did he tell you, Mr. Edelman?

Mr. Orseck: He told me.

The Court: Why don't you take the stand, then, and say it?

Mr. Orseck: Given time, I probably will. There is no need of it now.

Mr. Sergi: That is not what we are talking about. We are talking about what has happened to this jury. We are talking about a mistrial. He is now saying that he knew when he examined Mr. Maggiolo that there were timesheets. Why didn't he move for further discovery then? Why does he (1523) wait before the jury to ask me for further timesheets? The proper time would have been to move for further discovery—was when he heard about it from Mr. Maggiolo and not make a demonstration here before this jury as he has done repeatedly.

The Court: Did Mr. Maggiolo say he had timesheets?

Mr. Edelman: Progress records.

Mr. Sergi: How do you know these are not the progress records?

*Joseph Diaco, for Defendant Maggiolo, Cross*

Mr. Edelman: Your Honor, as I understand progress records, it indicates the work that was being done, where it was done, and what happened during the day.

The Court: That's your definition.

Mr. Edelman: That's my definition.

The Court: You want your form. You want Mr. Sergi to produce what you consider a progress record and not what this witness says they consist of, but your conception of progress records.

Mr. Edelman: Your Honor, may I have read what this witness stated to the Court as to what the progress records consist of?

Mr. Sergi: Why don't you ask him whether (1524) —whether there are any other records. Ask the witness.

Mr. Edelman: I just have this one question as to what he said the progress records consist of.

May I have the question please read so your Honor will see exactly what this witness stated. And that those records are not the records which he is referring to.

(Court examines documents.)

The Court: What do you say these code numbers were?

The Witness: Well, we have a code book. I don't exactly recall what these were. But I would say this might be excavating up to 5 feet or it might be excavating up to 10 feet.

The Court: Is that what you mean by progress reports, code numbers?

The Witness: Right. This might be installing 12 inch pipe. This might be installing 20 inch pipe.

The Court: That is these code numbers like 1700-10, 1700-11, 1700-12, 1700-98 and 8510-02.

Who had the code book?

*Joseph Diaco, for Defendant Maggiolo, Cross*

The Witness: The foreman had this code book.

(1525) The Court: Is this in the trade or just Maggiolo's way of keeping records?

The Witness: No, it is just his way. There is a different way of keeping their time sheets and their progress reports, each outfit has a different one.

This is the way he did it.

The Court: Did you ever ask, Mr. Edelman, what these numbers meant?

Mr. Edelman: No, I didn't have enough intelligence to ask.

The Court: So that supplies the missing information that you said was not in these reports.

Mr. Edelman: Well, your Honor, may I have the question that I asked regarding the report, please, the one question that I have asked of the gentleman of what the report consisted of? If it is not in there, then I abjectly apologize. But I got the impression there was a specific answer.

The Court: Read it back.

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(1534) The Court: I don't make those determinations. I will let Mr. Edelman ask about that. I don't mind deep, extensive and revealing inquiry. What I resent is unfair inquiry, that is all.

And I resent these grandstand plays that are never intended to produce evidence but just intended to embarrass the defendant in the hope that it might somehow bring about some resentment by the jury.

(1535) But I think I can remove it.

Seat the jury.

(Addressing jury:) A trial is conducted under rules that the lawyers understand. The rules are designed to give both sides a fair trial. I am

*Joseph Diaco, for Defendant Maggiolo, Cross*

here to enforce the rules and only because I insist on a fair trial.

I want this case decided on the evidence produced before the jury and not on the bi-play of lawyers.

Now Mr. Edelman was warned not to demand the production of documents before the jury. At times lawyers are known to demand documents because then the other side hasn't got them, the idea being that the jury will get the idea that one side is hiding, concealing something from them, and that might generate a little resentment.

I want to eliminate that.

I don't want you in any way to consider this demand for the production of documents. I don't want it to hurt Mr. Edelman's client and I don't want it to hurt Mr. Sergi's client.

I am just going to demand strict adherence to the rules.

\* \* \*

(1532) The Court: I'm going to deny the motion for a mistrial. I thought about it seriously. I have spent a lot of time on this case. I just do not want to react to it. I am pretty angry about it. That doesn't mean that prejudice resulted, or if it did, that I can't minimize it or eliminate it, by telling the jury that Mr. Edelman had these progress reports all the time.

Mr. Sergi: This is the back of it. We just had the photostat on different sheets.

The Court: This is the back for this (indicating)?

The Witness: Of this sheet. These two go together.

(1533) The Court: Both are backs?



*Joseph Diaco, for Defendant Maggiolo, Cross*

The Witness: One is the front and one is the back. No, this is the front and this is the back. This is one sheet like this (indicating).

The Court: Why don't we staple and let the witness testify to it?

Mr. Sergi: Would your Honor please inform this jury about Mr. Edelman having these all the time—

The Court: Well, I don't want to tell them my personal views about Mr. Edelman's conduct because there is a plaintiff and a defendant here, not the lawyers. I wish I could punish just the lawyers. I don't want to spend my time on that. I have too much else to do.

But this case is taking twice as long as it should take. I attribute about 90 percent of that to Mr. Edelman and about 10 percent to Mr. Sergi.

There is no way to control a trial like this but just let it go on and on and hope that it's going to end sometime.

Go ahead, seat the jury.

\* \* \*

(1608) The Court: I know all about the computations. I was making it in my own mind over the weekend, but that is not the point.

You misinterpret and/or misrepresent the testimony, because then—and now you say, "And now you say" as if he changed his testimony.

Mr. Edelman: If that testimony on direct examination is correct, your Honor, that he stated that the first time he loaded debris, and it would be at 2:00 o'clock, and therefore he was loading debris some two and a half hours, if we go back on the 40-minute time alone, it would have to be from about 10:00 o'clock or 10:30.

*Joseph Diaco, for Defendant Maggiolo, Cross*

Mr. Sergi: That's arithmetically and not necessarily fact.

The Court: That is not what I am talking about.

You said this witness testified that he loaded sand until two o'clock with a half hour for lunch. (1609) Where is that in the testimony?

Mr. Edelman: Your Honor, may I look at this for a moment, your Honor?

Your Honor, may I point, your Honor please, at page 1489?

"At any time, sir, at any time in the morning"—this is on direct examination—"from 8:00 o'clock until 12:00, 12:30, until 12:30 that day, was any one of your Maggiolo trucks carrying anything but sand and gravel?"

The answer is, "No."

"And then when—the 21st, when did you for the first time carry any debris on April 24?"

"Answer: About two o'clock in the afternoon."

Now, my understanding of that—my inference would be that he is testifying that they are carrying sand until two, with the exception of an hour and a half, and therefore this is my assumption, your Honor, and I think this can be a reasonable assumption from this, and then from 2:00 to 4:30 they're carrying debris.

The Court: It is an unreasonable assumption. The witness did not testify to that.

What you did was tell the jury the witness did (1610) testify to that.

Mr. Edelman: That was my assumption.

The Court: You have no right to assume that.

Mr. Edelman: I'm sorry, your Honor, then, but this is what I had based it on.

I didn't base it—this was my memory of what it was, and I understood that that—when I heard that testimony, that testimony to me, that they claimed sand only until—

*Joseph Diaco, for Defendant Maggiolo, Cross*

The Court: That is because that is what you wanted to say. You did not hear what he said.

Why didn't you ask him whether he was carrying sand from 12:30 to 2:00 o'clock, so you wouldn't have to assume it.

But you wouldn't do that. You wouldn't give him the chance to say it. You'd rather tell the jury that he lied. Right? That's the method of cross examination.

Seat the jury.

(1604) The Court: No. I want to call Mr. Edelman's attention to what he did misrepresent. When you said to this witness, "Now you say that they—they were loading sand until twelve o'clock," as if to say that he has changed his testimony.

Mr. Edelman: That was my understanding.

The Court: Why don't you read the testimony? It says nothing like that.

I recall this very clearly only because the thought occurred to me that possibly during that period of time, from 12:30 to 2:00 o'clock they were demolishing houses, and it was not accounted for, but you do not care what the testimony is. You just say, "You are changing your testimony now."

Mr. Edelman: I thought—That was my recollection.

The Court: He said from 8:00 o'clock to 12:00 he was loading sand. From 12:00 to 12:30 they took lunch. From 2:00 o'clock to 4:30 they were trucking debris.

No testimony as to what happened between 12:30 and 1:30, but because there is no testimony, you fill it in yourself. Why not?

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*Brian DuBois, for Defendant Maggiolo, Cross*

(1705) Mr. Sergi: Objection. Your Honor ruled it out before. He is asking it again.

The Court: Well, if it is a matter that you are asking over my ruling, go ahead, Mr. Edelman, and the risk is yours. Go right ahead.

Mr. Edelman: I didn't remember your Honor ruling on it.

The Court: I don't know what it is, but I suggest you do it.

Mr. Edelman: Your Honor, I don't remember your ruling it out. But as far as that is concerned, I will waive the question.

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(1750) Mr. Sergi: What did I tell him, Mr. Edelman? I asked him to listen to the question as I'm listening to the question. Isn't that correct, Mr. Edelman?

Mr. Edelman: Yes, your Honor but I—

Mr. Sergi: May I have the question now?

Mr. Edelman: I respectfully request that Mr. Sergi not talk to the witness.

The Court: That's right. And I request that you not make the type of statement you made that might indicate that Mr. Sergi is feeding answers to the witness.

Mr. Edelman: I wasn't trying to do that.

The Court: It might be so interpreted by the jury, Mr. Edelman.

\* \* \*

(1929) Q. And did he tell you he is making a record of your conversation? A. He did.

Mr. Edelman: At this time I ask for the production of the recording, your Honor.

Mr. Sergi: Your Honor has admonished Mr. Edelman about this.



*Brian DuBois, for Defendant Maggiolo, Cross*

The Court: Did I ask you not to make a demand in front of the Jury?

Mr. Edelman: I'm sorry.

The Court: You apologize and keep doing it. You don't obey the directions of this Court. You just completely disregard it every time, Mr. Edelman, no matter how clearly and emphatically I state it.

Mr. Sergi: He is doing it on purpose, your Honor.

The Court: The Jury is excused.

(Jury excused.)

The Court: You are just impossible to control. You don't care about anything the Court says. You just have a way of trying this case and nobody's going to interfere with it,—no one, not defense counsel, the Court or the law—nobody.

That's the way you try a case.

(1930) Have you got the records, Mr. Sergi?

Mr. Sergi: I state unequivocally as an officer of this court that I have never seen or heard it.

The Court: Where is Mr. Holmes?

Mr. Sergi: I don't know.

Mr. Edelman: I think he was in this courtroom.

Mr. Sergi: He was not in this courtroom.

The Court: Don't get upset Mr. Fetell. It has no effect.

Mr. Fetell: Something happened outside, your Honor. I'm reacting to something that happened outside.

That's what the noise was the other night and I was reacting to it.

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(1932) Mr. Edelman: I'm sorry. It is a matter of habit.

*Brian DuBois, for Defendant Maggiolo, Cross*

The Court: I don't care what your habit is. If that's your habit and you can't get out of it you should not try cases in this court.

Try your case elsewhere. We can't take it.

Mr. Sergi: Once more—and I say it sincerely and regrettably—I don't know how in the world we can try this case with Mr. Edelman's tactics.

This Jury has been contaminated and prejudiced by comments and gestures and by counsel's refusal to accept admonishment in this case.

(1933) It is impossible for this Jury to decide this case and I move for a mistrial.

I don't know how we can correct it.

You keep saying it to him—

The Court: I don't think this is of such prejudice that it will make a difference to the Jury but I am thinking of doing it just to "teach Mr. Edelman a lesson."

It cost him money to prepare the case. If I declare a mistrial it will probably cost him a couple of thousand dollars. Perhaps, that's the lesson Mr. Edelman needs.

Mr. Sergi: Your Honor, I don't think my client should be prejudiced in order to teach Mr. Edelman a lesson.

The Court: Your client won't suffer so much but the Court is suffering.

\* \* \*

(1935) The Court: Well, you and I both but I hope Mr. Edelman has a trial on for Monday.

I can tell you, I won't rush charging all requests to charge. He will sit here and wait until I am ready.

That's the way I will do it.

*Brian DuBois, for Defendant Maggiolo, Cross*

And, the next time you have a trial before me, if you do, I am just going to assign it to someone else.

I just can't stand your antics any more. Why should I?

Seat the Jury.

(Jury entered Jurybox at 2:40 p.m.)

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(1990) any other reason.

The Court: All right. 10:00 o'clock, gentlemen.

(Case continued to December 11, 1974 at 10:00 a.m.)

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The Court: I am prepared to spend the rest of the month on this case. I am going to try to adjourn all my other matters. I am not going to rush. I am going to get back into my office and do some work that's been piling up. I have been sitting here until 5:00 or 6:00. I haven't had chance to dictate to my girl during this trial, the stuff is piling up, and I have been doing it during my lunch hour and before I get on the Bench at 9:30. But I see the lawyers are dawdling, sitting back, repetitious questions, four questions asked where one would do. Why should I hang around until 5:00 o'clock.

Mr. Sergi: I don't think it's fair that you refer to lawyers. You know who you are talking about.

The Court: Mr. Edelman is probably 90 per cent culpable, but I have noticed it in your (illegible) too, Mr. Sergi, maybe you are reacting.

Mr. Sergi: I'm trying to.

\* \* \*

*Brian DuBois, for Defendant Maggiolo, Cross*

(2053) Mr. Sergi: May I have what you are reading from, please? I'm not reading from anything.

Mr. Sergi: He's looking at something and it would appear that he's reading from something.

If he is and I have a copy of it, I'd like to follow it, your Honor.

The Court: Don't give the appearance that you are reading from a document if you're not, Mr. Edelman.

Mr. Edelman: All right.

The Court: That's improper.

Mr. Edelman: All right.

\* \* \*

(2056) Mr. Edelman: Because he testified before that the fact that during lunchtime that there—they were told about the accident. That was my memory. I thought this would be inconsistent to it. If not, I'll withdraw it. That's the only purpose of it.

The Court: If you're withdrawing it, I don't have to rule on it then.

Mr. Edelman: All right. I'll withdraw it.

The Court: Repetition takes a lot of time, Mr. Edelman: You know that. I'm speaking at 4:30. I'm taking a full hour for lunch.

Mr. Edelman: Your Honor, I'm not going to ask the question.

The Court: You just dawdle along.

Mr. Edelman: I'm not going to ask the question.

The Court: Go ahead. We'll give you the usual treatment that you get in the usual court. That's the treatment you deserve.

(Jury present.)



*Brian DuBois, for Defendant Maggiolo, Re-cross*

(2057) By Mr. Edelman:

Q. By the way, how long does a trip, around trip, would take from the place where you were pick—you picked up the concrete, the foundation to the laundry, the round trip from the time they began loading it to the time it came back?

Mr. Sergi: Objection. Answered several times.

The Court: I remember the witness answering it but go ahead, Mr. Edelman. Ask it again. Go ahead. Answer it, Mr. DuBois.

\* \* \*

(2071) Q. I'm talking about after I examined you last and before Mr. Sergi examined you, is it not a fact that you went out to the hall right outside this Courtroom? A. Yes, I did. I went out there and I also went to the bathroom.

Q. And also is it not a fact that Mr. Lester Fetell, Mr. Sergi's partner, was talking to you at great length outside this Courtroom? A. You want me to tell you what he told me, Mr. Fetell—I mean Mr. Edelman?

Q. No. I'm just asking you, is it not a fact that he had talked to you at great length right outside this Courtroom?

Answer the question. A. He spoke to me, yes.

Q. All right. And how long did he talk to you? A. He said a couple of words when Mr. Orseck came past.

Q. I didn't ask you for that.

Please tell this Court and Jury how long he was talking to you? A. I just told you. He just said a couple of words.

\* \* \*

(2074) nothing to help anybody."

Isn't that exactly what occurred at that time, according to this statement that you gave in the motel? A. That was his words.

*Brian DuBois, for Defendant Maggiolo, Re-direct*

Q. Wasn't this your answer to the question? A. They was—Mr. Edelman, it says right on the paper there what he had said, and you must read off what he had said. And I said to Mr. Orseck, I says, "I know what happened that day." I says, I would have—he brought a statement, who knows, I might have signed it.

Mr. Edelman: Your Honor, I respectfully ask that it be stricken as not responsive.

The Court: Motion denied.

Mr. Edelman: No other questions.

The Court: Mr. Sergi.

*Re-direct Examination by Mr. Sergi (Cont'd):*

Q. Tell us what Mr. Fetell said to you out in the hallway?

Mr. Edelman: I object.

The Court: I will allow it.

Q. What did Mr. Fetell say to you out in the hallway?

A. He says, "Brian," he says, "Take it easy." (2075) He says, "Don't get hot." He says, "Just answer the questions that he keeps giving you."

I says, "Why does he keep asking me the same thing?"

He says, "Just keep answering the questions."

Mr. Sergi: Thank you very much.

No other questions.

Mr. Edelman: No other questions.

The Court: Mr. Bernhard.

Mr. Bernhard: I have no questions.

The Court: Anybody else want to ask any questions?

(No response.)

The Court: You may be excused.

(Witness excused.)

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*Colloquy*

(2133) Mr. Sergi: Objection. Same question answered before.

A. (Continuing) You mean—

The Court: We will have it again. Go ahead. Go ahead. It's repetition. It's time-wasting. It does no good.

A. (Continuing) I don't know.

The Court: You may keep asking the same question.

A. (Continuing) I never got out and looked at the load, unless I see something hanging off the truck.

The Court: I found it impossible to control the lawyers by just ruling on objections, so I am letting them do the wrong thing until they finally realize that the jury will not like it, you see, and then they will stop. That is the one time they will stop it.

By Mr. Edelman:

Q. By the way, regarding the Gorr trucks, isn't it a fact that the side of the Gorr trucks had different heights? Some were a little higher and some were a little lower; is that right? A. Yes.

Q. Is this a true and fair representation of the (2134) side of one of the Gorr trucks that was being used in connection with this job?

Mr. Sergi: Just a minute. Excuse me.

May we have it marked for identification?

Mr. Edelman: Sure. I'll have them all marked.

The Court: May I see the pictures?

Mr. Edelman: Sure. I think these (indicating) are sufficient.

The Court: May I see them?

Mr. Edelman: Sure.

*Colloquy*

The Court: Suppose you take a recess. Take about 10 or 15 minutes.

(The following occurred in the absence of the jury.)

Mr. Sergi: You can step off—

The Court: Oh, no.

Mr. Sergi: Sorry. I thought perhaps Mr. Edelman would—

The Court: You see, the jury is starting to snicker at the antics of both lawyers, and if you want to laugh yourself out of court, go right ahead and do it. This is the kind of examination that is going to do it for you.

Now, mind you—

(2135) Mr. Edelman: I'll withdraw it.

The Court: No, no. You do not have to withdraw it.

I gave them 10 or 15 minutes so you can do all your playing outside their view.

There is no question that there were red trucks, Ford trucks. I had it coming out of my ears. Ten-wheel dump trucks, three and a half yards, four and a half yards.

Now, these pictures show nothing more than they are red dump trucks, 10 wheels, and you're willing to take this jury's time.

I want you to ask all the questions of this witness outside the hearing of the jury that you would ask before the jury. I want the record to be replete with the conduct of counsel in this case.

The Clerk: Four photographs—

The Court: I want the Court of Appeals to know if they ever want to look at the record, that at this late stage of the game Mr. Edelman is going to prove to this jury that what Maggiolo used on that day was 10-wheel dump trucks, Ford dump trucks. Some of them on the front had "You call, we haul."

Any question about that, Mr. Sergi?

• • •



*Colloquy*

(2211) Mr. Sergi: May I be heard, please?

I want Mr. Edelman to point out to this Court where in Mr. Maggiolo's testimony during the deposition he said he had more records than Mr. Diaco said he had.

The Court: Mr. Sergi, I think I recall the testimony. I agree with you.

If this is another grandstand play then let Mr. Edelman have it.

He can bring him in tomorrow. Where's Mr. Maggiolo?

Mr. Sergi: I have no idea where he is. I don't even know where this was served.

\* \* \*

(2283) dam. Don't for one moment think that I believe that Mr. Sergi is going to be the man with the white hat and that Mr. Edelman is going to be the villian here. I'm going to watch them both.

Mr. Fetell: I have no quarrel with that.

The Court: All right.

Mr. Orsek: Even if they use some Brooklynese expression such as "flying"—

The Court: The Brooklynese discussion, I discounted. I will allow him—I know he can't help that. It's how he uses it and the purpose he uses it.

Mr. Fetell: All right. Now, the defendant Maggiolo requests.

The Court: All right. Anything wrong with 1, 2, 3 or 4?

Mr. Edelman: No, your Honor.

The Court: All right. Any others? I found no fault with any of the others. I want to know if you find fault.

Mr. Edelman: Yes. In reference to 5.

The Court: Yes.

Mr. Edelman: In reference to the second portion of David Utegg. The factual basis—to unduly emphasize any testimony or throw doubt upon the (2284) authenticity or the—

*Colloquy*

The Court: I don't know. I will allow him to argue.  
Mr. Sergi: Yes, your Honor.

The Court: I sustained objection to most of what Mr. Sergi intended to offer on that second deposition. That was because of a misconception of what I said he might get from the second deposition.

Mr. Fetell: Would your Honor—in the light of your Honor's ruling in that regard—I understand we are not going to argue that. That is water under the bridge. But would the Court make an appropriate charge to the jury that why in the case of Mr. Utegg—of the two of them that were read, and I would respectfully call your attention to 36 of the transcript made in this Court on Friday before the trial started.

"The Court: I want it definitely in some affidavit on Monday exactly when he will be able to travel."

I will go back and put it in context.

"The Court: This witness—"

The Court: I remember it well. I am not going to say anything about it.

Mr. Fetell: I want to put it on the record.

The Court: All right.

(2285) Mr. Fetell: "The Court: This witness," referring to David Utegg, "are you ready to permit Mr. Sergi to say to the jury the representation was this witness would be able to travel here by Thursday."

"Mr. Edelman: I have no objection to that, your Honor."

Leaving out some additional colloquy—

"The Court: I want it definitely in some affidavit on Monday exactly when he will be able to travel. I want Mr. Sergi to be able to say this to the jury, if Mr. Utegg doesn't appear here—he represented he'd be here on that basis. I have my case here. He is a liar. Mr. Utegg must be a liar because he won't come here voluntarily. Now, you want—"

*Colloquy*

We respectfully request leave to make the argument that the Court ruled on before we went to Scranton that Mr. Sergi has the right to say to the jury certain things in the absence of Mr. Utlegg so that we are consistent with your Honor's ruling in that regard, number one.

Number two, some explanation of the second deposition of Utlegg.

The Court: All right. I try to recall all (2286) this and I lost track of it. This is because Mr. Edelman insisted on starting the trial on the 25th, and you felt that you needed more time to investigate. And you felt that Mr. Edelman was keeping Mr. Utlegg out of the Court.

Mr. Edelman: And also put him in the hospital.

The Court: And Mr. Edelman didn't make a representation—

Mr. Sergi: Your Honor, if I may interject myself.

The Court: I painted myself into the corner on that.

Mr. Sergi: I would like to remind the Court that my request was that I would have time to serve Mr. Edelman—I'm sorry—Mr. Utlegg with a subpoena so that he would be here in the courtroom. I specifically stated, examining him in a deposition in the hospital would be of no consequence. He would say the same thing as he said before. We want him here in the courtroom.

At that point your Honor made the request of Mr. Edelman—and this was the conversation that your Honor directed to Mr. Edelman, and this is the comment that your Honor made to Mr. Edelman and I relied on that, that if Mr. Utlegg did not come down (2287) here after we served him with a subpoena, as your Honor requested, that I could comment since he's not here he's a liar.

The Court: What do you say?

Mr. Edelman: Your Honor, as far as his comment that since Mr. Utlegg is not here, that he is a liar, I have no

*Colloquy*

objection to it. We have no way of controlling him or did we ever—or have we ever been able to control Mr. Utegg.

Mr. Utegg, by the way, was first produced as a witness after a great deal of pretrial discovery proceedings, and at no time did—we were able to go ahead and get an examination unless we forced it. After this examination was held and until the time when this case was reached for trial, we had no idea where Mr. Utegg was or what he was doing.

And, as a matter of fact, Mr. Sergi made the representation to your Honor in unequivocal language, number one, that we put him in the hospital; number two, we put him in a position outside the jurisdiction of this Court, so, therefore, he could not be served with a subpoena. And number three, that Mr. Orsek went ahead and committed fraud in the original application—original deposition, and that further fraud is going to be committed upon the Court. And (2288) then pursuant to my request, after they wanted an adjournment to March, I asked your Honor to hold this. And I went outside and we called Mr. Utegg. And we found lo and behold that he was put in the hospital two days before, a d after—

The Court: You said this before on the record. This is the kind of repetition that does nothing more than waste time. I know all about that. But you agree that Mr. Sergi can make that comment.

Mr. Edelman: That he claims that he is a liar, I have no objection to him—

Mr. Sergi: That his actions indicate that he's a liar.

Mr. Orsek: No.

Mr. Edelman: This, your Honor, is certainly improper.

The Court: Well, wait now.

Mr. Sergi: I want to use the language that your Honor suggested.



*Colloquy*

The Court: I said it. I know that the situation has changed. But there is something else that substitutes for it. There may be enough in the record to show that Mr. Utlegg was under the control of the plaintiffs. And I might very well charge that if they find that he was in the control— (2289) under the control of the plaintiffs, then they may draw an unfavorable inference from his presence here.

Mr. Fetell: Absence.

The Court: From his absence here.

Mr. Edelman: Your Honor, I don't think there's any evidence at all—

The Court: Let me point out some of it.

Mr. Edelman: Well, I would like to—

The Court: Harold Utlegg said that he was brought to the office on Mr. Orsek's telephone call. He said that Mr. David Utlegg said that there was—they never were down that road before. He said that he left the office in—he left the office when David Utlegg was with Mr. Orsek. And then later he gave a deposition saying he was down that road.

Now, I don't say he was under the control. I don't credit any of the testimony. I am saying that there might be enough in the record from which the jury might infer that David Utlegg was under the control of—at the time of this trial was under the control of the plaintiff. And I might comment on the failure of Mr. Utlegg to be here.

There is nothing to indicate that he can't be here, that he is physically disabled. Everything that was told to me indicates that he can get here if (2290) he wants to.

Mr. Orsek represented to me that he is willing to send an ambulance up there to bring him down here. That's how anxious he is to get him here. And he is not here.

*Colloquy*

Mr. Orsek: Not because I have any control over him, but I was willing to spend the money to bring him down in the interest of fair play.

The Court: I don't say that you do. But Mr. David Utegg is not here.

You made a certain promise, Mr. Edelman, based on the inability of the defendants to bring him in here and examine him. There is evidence in the record to indicate that of the four drivers Mr. Utegg decided after first saying that he never was down Glenwild Road that morning, that he was on Glenwild Road. He did that in the deposition. I think that the jury can reasonably infer that he refuses to come and submit to cross examination.

Now, I say that I don't think you should have it both ways. You made a statement. You made a representation to start with. And now you want to back off.

I am in a difficult position only because I don't know how to force any representation except to (2291) point out to the jury that Mr. David Utegg isn't here. If they find from the evidence that Mr. Utegg refuses to appear here voluntarily, even though he's under your control, a certain inference may be drawn. I don't know whether it's the inference of the absent witness because we do have a deposition. But I want to formulate something.

Mr. Edelman: May I be heard on that?

The Court: Surely. Go ahead.

Mr. Edelman: Firstly, there is no evidence—I think the evidence that your Honor stated does not indicate that he is under our control. The fact that he came to Mr. Orsek's office—if you take the corollary of that—the fact of these six witnesses, just by a telephone call came to the Patio Motel, and they were working at the time for Maggiolo—that just by a telephone call by Mr. Hume, that that would indicate the other side of the coin.

*Colloquy*

The Court: Let's assume they produce him. They produce him. He was subject to your cross examination. And Harold Utegg—

Mr. Edelman: Your Honor, there's—Mr. Utegg was subject to the cross examination very exhaustively both on the first examination before trial and the second examination before trial. And if your Honor (2292) would read the second examination before trial held in the hospital for over two and a half hours, I practically made no objections and he went—

The Court: But the cross examination was misconceived. Do you see, had I made the ruling and Mr. Utegg was here, then he could have asked Mr. Utegg the very questions that he could not now ask because it was a deposition. Mr. Sergi obviously was under the impression that all he had to do was ask Mr. Utegg, David Utegg, what happened, and he'd just deny it. He never asked him whether he made certain statements. (2293) Mr. Orseck: Yes, he did.

The Court: To Brian, Dubois and to his brother Harold Utegg. And, therefore, Mr. Sergi was precluded from bringing that cross examination before the jury.

Would you have any objection—would you have that objection to the admissibility of the evidence?

Mr. Edelman: No.

The Court: And let it come in and let him bring it before the jury.

Mr. Edelman: No.

The Court: All right. So you want it all ways. There is still another way, incidentally, and I will do it if you wish. I will adjourn the case. I will give you the right to depose Mr. Utegg again and ask him those questions specifically so that you can repair the damage or at least conduct the examination with what you now know is the ruling of the Court and then bring Dubois back.

*Colloquy*

Mr. Sergi: I appreciate your very charitable offer, your Honor, but I have had enough of this trial. I would like to end it. This is the third week. I have other commitments.

I am satisfied with what your Honor has suggested, that I have a right to comment to the jury exactly as your Honor indicated to me on Friday. And I (2294) intend to go along—

The Court: I didn't say that. I asked Mr. Edelman whether he consented to it. And he first said, "Yes," and then he withdrew it. He backed down. But there—there is an alternative. And I may try to formulate it. It is not only the alternative I offered you—and that is a charge to the jury pointing out the absence of Mr. David Utegg—and I'd have to do a little research on it but I will do it to determine whether you are entitled to the inference.

Mr. Fetell: We don't insist on the language of No. 5, but the request was made so that your Honor would make some sort of charge to the jury to explain the last situation of two depositions of one witness. If your Honor feels—I think your comment to Mr. Sergi sounded like a summation and it was not intended to be that, but there is—there's got to be some direction by this Court explaining to this jury why that happened. There is a distinction in connection with Utegg that is "mah ni shtana halailaw hazaeh"—that's an old Hebrew phrase which he has written on his blackboard—there's got to be some explanation to the jury to explain why this was handled differently.

(2295) We would leave it to the Court. We merely request that something be done to explain.

The Court: I think I am helpless except to give a conventional charge if I can find one on the failure to produce a witness that is not subject to subpoena where he has given a deposition, where there is an indication



*Colloquy*

from the evidence—where it might be inferred that the witness was under the control—

Mr. Fetell: I will go one step further for the record. Where a *de bene esse* deposition can be used, there's got to be affirmative proof of unavailability. We never raised it. And there was a reason. I think there was a complete misunderstanding as to what happened that Friday. I am not being critical of the Court, but it was an unusual situation and required unusual treatment. And that's why we didn't raise it. But I think we are entitled to some charge to this jury. We don't insist on our language.

The Court: I only have to give a charge based on citations of authority. There can't be any authority for anything like this.

Mr. Fetell: Except there are inherent powers in the Court to do certain things in the interest of justice. And we are not bound by rulings—

The Court: Possibly it's agreeable to counsel (2296) that they so stipulate.

Mr. Fetell: Well, he has—I have no objection to that, your Honor. That's Mr. Edelman's stipulation. Now, if he wants to back off on that, we can't handle it. It's up to the Court.

The Court: What did Mr. Edelman just say at this moment about what he agreed to do, Mr. Barbella?

Mr. Sergi: At this moment—

The Court: No, about three or four minutes ago.

Mr. Sergi: He said he agreed.

Mr. Edelman: No, I said I have no objection if he wants to call Mr. Utegg a liar. That's his—

The Court: Now, look, Mr. Edelman. We have dealt too long for this nonsense. I expect representations of a lawyer to be direct. And I don't expect you in any attempt to mislead the Court.

*Colloquy*

Mr. Edelman: I am not trying—

The Court: That is not what you said.

Mr. Edelman: Would you read what I said before?

The Court: All right. Now, let's hear it once more. Read it once more, what he said some time ago.

Mr. Fetell: I am going to go back to page 35 to bring it in context.

"The Court: You can turn that around very easy (2297) if it's true.

"Mr. Sergi: I am afraid if I made a statement like that Mr. Edelman would object and would say to the Court I have no control over this witness. Your Honor, he can't make that statement.

"The Court: Now, look, Mr. Edelman represented this witness said he'd be out of the hospital Monday and that he or his doctor said that in three or four days he will be able to travel or maybe one or two days. You made that statement.

"Mr. Edelman: That's correct. That's what he stated.

"The Court: Are you ready to permit Mr. Sergi to say to the jury that the representation was this witness would be able to travel here by Thursday?

"Mr. Edelman: I have no objection to that."

The only thing I will state is that exactly what the witness told me—what the doctor told me, that he is being released Monday. The witness told me—the doctor says Monday or Tuesday that he expects to be able to travel in a few days. Thereafter, if all things are equal—

I submit that in the three weeks that we have been here—

The Court: How about that as a stipulation by (2298) counsel? That statement.

Mr. Edelman: I have no objection to that.

Mr. Fetell: I'd like—

The Court: All right.

*Colloquy*

Mr. Fetell: (Continuing) —the further statement of the Court, "I want it definitely in some affidavit on Monday exactly when he will be able to travel."

There was no affidavit forthcoming. I continue to read from page 6:

"I want Mr. Sergi to be able to say to this jury if Mr. Utegg doesn't appear here, here it is, he represented he'd be here. On that basis I have my case here, a witness. He is a liar. Mr. Utegg must be—must be a liar because he won't come here voluntarily."

Two problems arise out of that.

The Court: Wait now. Do you have any objection to Mr. Sergi saying, David Utegg said that if he was able to be here he would be here?

Mr. Edelman: I have no objection.

The Court: He said—wait now. He said that he couldn't be here before the next Thursday, which was the 5th of December. It is now the 12th of December. Where is Mr. Utegg? He must be a liar.  
(2299) Or words to that effect.

Mr. Edelman: Your Honor, what the—the portion of that that I do object to is that Mr. Utegg stated exactly what he—what I stated on the record. And anything beyond that, that Mr. Utegg will be here, is not part of the record.

Mr. Utegg stated, and in which I told your Honor that he expected to be released in a day or two, and the fact that he may be able to travel—it's up to his doctor. And this is what—by the way, exactly what Mr. Utegg stated in the deposition that we took on Sunday.

The Court: I am just asking whether we can consider that a stipulation made between attorneys concerning Mr. Utegg's statement as to, one, his ability to appear at the trial and two, as to his willingness to appear at the trial.

*Colloquy*

And from that, that Mr. Sergi may argue that he didn't want to come here because he was a liar.

Mr. Fetell: One additional item. Counsel—Plaintiff's counsel has certified to the Court he would provide an affidavit as to his condition. And that we have fair comment on that, the fact that plaintiff's counsel has thrown his hands up and says, "I don't know where he is, and I am not going to help (2300) you find him."

The Court: That is separate and apart.

Mr. Fetell: I said two items.

The Court: I am more interested in Mr. Edelman representing what Mr. David Uttegg's position is to be.

Mr. Fetell: And he would double-check.

The Court: And it is not within the subpoena power. It could be that David Uttegg refused to come. This to me would also be an indication that he didn't want to face cross examination. And I think he can argue from that. But the point is, it is David Uttegg's statement that you should argue and not Mr. Edelman or Mr. Orteck's representation that he offered the means of transportation, and so forth.

Mr. Fetell: With that agreement, Mr. Edelman sums up. And we have to assume—we have to face that problem, what is fair comment. We might as well—

The Court: If you agree to a stipulation—what do you want, some agreement that Mr. Edelman won't say anything about it?

Mr. Fetell: I want Mr. Edelman turned off before the harm is done.

The Court: Oh, come on, come on. You want to write Mr. Edelman's summation.

(2301) Mr. Fetell: No. I want to prevent him going into an area that will be prejudicial.

The Court: He will only be arguing about matters in evidence. He will be able to only argue on the stipulations, the terms of the stipulation. He will be able to



*Colloquy*

say, how do we know that Mr. Utegg is unable to come here? He thought that he could be here on the 5th.

What is wrong with that?

Mr. Fetell: My point is, your Honor, that counsel made a representation as an officer of this Court that they would check out his physical condition. And you—we haven't, and the Court hasn't heard one iota as to whether they ever picked up the phone to find out whether he is alive or dead. They promised to prove to you—forget about the affidavit, and they—

The Court: Mr. Fetell, I just feel that the defendant—the plaintiff is happy that Mr. David Utegg isn't here. Whether they made efforts or not, I don't know. But whatever comfort he gets from his not being here, he has a right to—because he is satisfied with the deposition. But I can see by his refusal to permit the inadmissible testimony to come in as to what Mr. David Utegg has said about the— (2302) about the happening of the accident, and Mr. Harold Utegg's testimony as to what his brother had told him to indicate that they are satisfied with just the deposition as it was.

Mr. Fetell: All right.

The Court: Now, I am not that unsophisticated and inexperienced not to go behind—not to go behind the record to find the reason for it. There is no question in my mind that David Utegg's appearance in court for cross examination might not have hurt the plaintiff, but could have helped the defendant.

Mr. Edelman: Your Honor, may I be heard on that?

The Court: Now, wait now. I can't fault the plaintiff for taking objection to admissible evidence. And so I can't insist on anything. Because he may very well have a stipulation here to bind counsel. If I find a stipulation, it will go in.

Mr. Edelman: May I just, for the completion of the record, your Honor, under any circumstances, your Honor,

*Colloquy*

David Utegg lives in Pennsylvania. He is outside the jurisdiction of this Court. Even if we wanted to force him to come in, he had a perfect right to remain out. In addition to that, we have made very strenuous efforts to have you admit David Utegg (2303) because it was my considered judgment that a blind man or a virtually blind man on the stand subjected to cross examination by Mr. Sergi should generate a great deal of sympathy for us. And it is much better than the cold record.

The Court: Don't give me the logic. What efforts did you make to bring him in?

Mr. Edelman: First, let me be heard. In addition to that, Mr. Orseck will tell you the efforts that he made, that he spoke to the doctor and Mr. Utegg several times. But the defendants have been in contact with—

Mr. Orseck: Same day that I called.

Mr. Edelman: (Continuing)—with Mr. Utegg and maybe with this doctor and others. And, therefore under these circumstances—I mean it's not a one-way street. And that for the fact that they are trying to—to infer the fact that we control Mr. Utegg is not factual. And I—when this case first came up and I asked—

The Court: Why isn't Mr. Utegg here?

Mr. Orseck: Let me answer.

The Court: Go ahead.

Mr. Orseck: I beg of you, Judge—

The Court: Go ahead.

. . .

(2321) The Court: A stipulation between attorneys is a stipulation.

All right. "Mr. Edelman represented this witness said he'd be out of the hospital Monday and that he or his doctor said that in three or four days he'd be able to travel, or maybe one or two days. You made that statement.

*Colloquy*

"Mr. Edelman: That's correct. That's what he stated.

"The Court: This witness, are you ready to permit Mr. Sergi to say to the jury the representation was this witness would be able to travel here by Thursday?

"Mr. Edelman: I have no objection to that. The only thing I would state is that exactly what the witness told me, what the doctor told me, that he is being released Monday. The witness told me the doctor says Monday or Tuesday, that he expects to be able to travel in a few days. If all things are equal."

Mr. Edelman never agreed to the statement. He fudged it, and in the heat of what happened, I overlooked it.

He said, "Well, your Honor, I could only state what the—that the witness told me what the witness told me what the doctor told me. I cannot predict at (2322) this particular time."

So all I can give you is what I consider the stipulation.

Mr. Sergi: OK.

The Court: I think I can do that, as a matter of law, and I intend to do it.

So, call the jury in.

Mr. Edelman: I consent to it, your Honor.

The Court: All right.

Mr. Edelman: Your Honor, there is the other—he's got other requests to charge which we didn't go over.

Mr. Fetell: They won't take very long.

Where is my copy?

With respect to number five, we're not pressing it, your Honor, except we are requesting the Court to make some reference to the two depositions on Utegg.

The Court: I do not know that I will do that. When I talk about the evidence in the case, I am going to add deposition and say something about it, of course. You cannot judge them as every other witness because they

*Colloquy*

are not before you, but for every other reason, they should be judged as if they were live witnesses.

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(2329) Afternoon Session

The Court: I want the children to be at the wall closest to the courtroom, to my far left, outside of the view of the jury.

Mr. Edelman: The family you are talking of?

The Court: The children particularly.

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(2401) witnessed this accident? If this is factual? Where is he, as big as life? Why didn't they produce him?

Don't forget this big Patio Motel meeting, that they had in September, 1974. Mr. O'Banner was there. And they interviewed him and they had a stenographer. And he got \$50.

The Court: The jury may be excused.

(The following occurred in the absence of the jury)

The Court: Is there any proof in the record that—what's his name?

Mr. Edelman: Mr. O'Banner.

The Court: How do you spell his name?

Mr. Edelman: O'Banner.

The Court: Mr. O'Banner?

Mr. Edelman: Was at the Patio Motel.

The Court: Is under the control of the defendant?

Mr. Edelman: No. I didn't say that. I said Mr. O'Banner was in the Patio Motel.

The Court: Why didn't they bring him here? What obligation did they have to bring him here.

Mr. Edelman: Your Honor, I thought that (2402) certainly good common sense would dictate that they should bring him here. And the fact—



*Colloquy*

The Court: Why didn't the plaintiff bring him here?

Mr. Edelman: The fact remains that the plaintiff has no more duty to bring him here than—

The Court: All right. I can tell you, I intend to charge that there is no obligation upon the defendant to bring in any witness that isn't under his—his control and you may make no unfavorable inference from it. That the plaintiff must prove the—its case. If you thought Mr. O'Banner had testimony—had evidence that would be material and as you indicated, knew—might have seen the accident, why didn't you subpoena Mr. O'Banner?

Mr. Edelman: Your Honor, after I thought that—as far as my case is concerned, I had sufficient for prima facie case, for me to go ahead and try to go ahead subpoena someone that—who was at the motel, at a particular time, subpoena someone who apparently is presumed to have a close relationship with the defendant, subpoena someone who may have—they may have statements (2403) from—

The Court: Close relationship? They're out of business. This happened in April, 1972. And you say that at the time of trial this employer had good relationship with the employee?

Mr. Edelman: He may have.

The Court: May have?

Mr. Edelman: They were able to control him.

The Court: I don't see this ideally but you, Mr. Edelman told me that you intended to bring Mr. O'Banner in under subpoena.

Do you remember telling me that?

Mr. Edelman: Yes. But when I found out they had these minutes and they had statements, it would be foolish upon my part.

The Court: All right. I'm going to charge that they may draw no adverse inference because they failed to bring in Mr. O'Banner. And if you continue on absent

*Colloquy*

witnesses, that they had no obligation to bring in, I'll make it stronger in my charge.

Mr. Edelman: Your Honor, may—

The Court: You're going to give a fair summation here. (2404) Mr. Edelman: I intend to. Your Honor, in reference to O'Banner or any of the other employees, I respectfully submit that there is a presumption of continuance, that Mr. O'Banner was an employee at that time, that Mr. O'Banner, the records show—

The Court: You bring in the case by 9:30 tomorrow morning. I have some case against you, I don't want to waste anymore time. You bring in the case that says that once someone was an employee, there is a presumption of continuance and an employer has the obligation to bring him into court and if he doesn't, then you may draw an inference that he would give—

Mr. Edelman: I'll—I'll try.

The Court: Bring in one case anyway.

Mr. Edelman: That's what I'll try.

Mr. Sergi: Your Honor, may I further point out to the Court another incorrect statement that was made by Mr. Edelman in his summation. I turn to Page 148 of the transcript, which is the Maggiolo EBT. Wherein Mr. Edelman is asking,

"Question: Can you tell us what records you would keep?

"Answer: Daily records.

(2405) "Question: What do the daily records consist of?

"Answer: Everything that happened, was on that job.

"Question: They are called progress reports?

"Answer: You call them progress records.

"Question: How many pages do they consist of per day?

"Answer: Depending on the size of the job.

"Question: If the size of this type of job?

*Colloquy*

"Answer: One."

The Court: I heard him talking about the contract. You did say you were going to bring the contract. You didn't bring the contract.

Mr. Sergi: I don't mean the contract. He's now talking about progress records.

The Court: I don't remember him saying anything about progress records.

Mr. Edelman: Your Honor—

The Court: Yet.

Mr. Edelman: According to the statement, the progress records says everything that goes on in the job. That's what he stated. That's part of the record.

(2406) Mr. Sergi: But I got it. It's here.

The Court: All right.

Seat the jury.

(Jury present)

The Court: I will charge you in the main charge. In the event I forget to do it, I'd like to say now that there is no proof in the record that Mr. O'Banner is under the control of the employer, the Maggiolos.

And you may draw no adverse inference from the failure of the Maggiolos to produce Mr. O'Banner.

Go ahead, Mr. Edelman.

\* \* \*

(2431) Number three, if you remember, Mr. Elliott stated to you that when he got into the hospital itself, the Community General Hospital in Liberty, they asked him what occurred, and he told them exactly what had occurred.

By the way, he told them that a passing truck, a board fell off and hit him in the face, and they told them and they wrote it down. Certainly at that time it is incredible that he would not be telling the truth, if you are looking for where the truth is.

*Colloquy*

Did they ever confront him with anything that indicated one single deviation from the simple truth, as this man told it from the day of the happening of this occurrence?

Then the next thing is, he is taken from there to the Vassar Brothers Hospital in Poughkeepsie, and if you remember, and at that time it was virtually emergency operations, so later the same day, long before any lawyer is even in the case—and you remember at that time he also stated, they asked him the history, and he gave them the history exactly as he said it, and—

Mr. Sergi: Excuse me, your Honor, that was not included in the Exhibit, it was excluded by your Honor, and he is now commenting on the—

The Court: May I have that statement?  
(2432) (Record read.)

Mr. Edelman: This is Mr. Elliott's testimony. They wrote it down. That's all, nothing more than that. You remember—

The Court: What do you say about it, Mr. Sergi?

Mr. Sergi: He is referring to a—

The Court: Is there any application?

Mr. Sergi: I object, your Honor, to his comments on evidence which—on history which is not in evidence. He is referring to it and saying that it confirms the plaintiff's position.

He doesn't have to read it.

The Court: I have excluded any history in any hospital report. That is as a matter of law. Don't consider it.

Mr. Edelman's repetition of the history does in no way add to the credibility of Mr. Elliott's testimony that he gave before you on the witness stand. You understand that. It was only admitted for one purpose, to show the treatment, and to the extent that the history was necessary for the treatment, it was admitted, and for no other reason.



*Colloquy*

So the repetition by Mr. Edelman of all the histories before the doctor, and the implication that he (2433) might have given it elsewhere, adds nothing whatsoever to Mr. Elliott's testimony.

Now go ahead, Mr. Edelman.

Mr. Edelman: All right.

Remember also Dr. Ganin got on the stand, and they asked him about his records, and Dr. Ganin—By the way, this is in evidence, and I am strictly sticking to the record, your Honor.

Mr. Robert Elliott: he says, patient, detailed story of accident, "While on highway was struck by plank." And originally was, "from highway." It was changed from "highway" to "from truck" with the same pen, as you see, as the entire examination.

And then later on, apparently, he went ahead and added in another pen, "which fell from truck."

Mr. Sergi asked him where he got this story, where it fell from the truck, and he said he got it from the Vassar Brothers Hospital record.

Mr. Sergi: Your Honor, I must object strenuously. Why does he refer to something your Honor told him not to refer to?

The Court: The jury may be excused.

(Jury excused.)

The Court: What do you want me to do, Mr. Sergi? (2434) Do you want a mistrial at this late stage?

Mr. Sergi: I cannot believe—

The Court: Do you want a mistrial?

Mr. Sergi: Let me put my comment on the record, I have to get it off my chest.

The Court: I am ready for it, Mr. Edelman.

Mr. Sergi: I cannot believe that he is doing it without intention. He knows he should not.

The Court: Of course he is.

Mr. Sergi: And he is doing it and doing it and doing it. I don't want a mistrial. I will rely on your Honor

*Colloquy*

to correct it in your Charge, if you can. I trust that you will, because at this stage, after practically three weeks of work, and all of this money spent, I don't think we can ask for a mistrial, not at this point.

The Court: Seat the jury.

(Jury present.)

The Court: There is only one legitimate reason for Mr. Edelman to comment on the various histories, and that is to answer Mr. Sergi's argument, in effect, that the histories were planted with the various doctors by Mr. Orszek.

It is improper for Mr. Edelman to attempt to use (2435) the various histories given by Mr. Elliott in order to show how the accident happened. I repeat that there is only one reason that the history that Mr. Elliott gave to the doctors was permitted, and that is because the doctors required it for treatment. You had a right to know what Mr. Elliott told. Any other use that Mr. Edelman makes out of it is improper.

I have cautioned him a few times about it. I keep reminding you so that you may not be confused by Mr. Edelman's recital of the number of times that Mr. Elliott gave histories to various doctors, and certainly references to the histories that were contained in hospital records is totally improper.

We run this trial according to fixed rules. Mr. Edelman knows it. He's been told about them, and any comments by him about what was in the hospital report, or any implication, or inference, that he asked you to draw about what was in the hospital report, is improper.

Go ahead, Mr. Edelman.

Mr. Edelman: Thank you, your Honor.

In connection with the original hospital record, the record of Community General Hospital regarding time, you will see that according to that portion of the history, it says, "11:30 A.M." Not 12:00 o'clock. This was made—

*Colloquy*

(2436) Mr. Sergi: Your Honor, I don't know whether he doesn't understand you. If 11:30 is not part of the history, I don't know what is part of the history.

The Court: The time he checked into the hospital?

Mr. Sergi: He's talking about the time of the accident, 11:30 A.M.

Mr. Edelman: Not the manner in which the accident happened.

The Court: Are you saying that the hospital record says he came into the hospital 11:30?

Mr. Edelman: No. It states the fact that the accident happened 11:30.

The Court: Of course that is wrong. Of course it's wrong. Mr. Edelman, you know better. You are an experienced trial lawyer.

I keep admonishing you about things, but you pay no attention to me whatsoever. There are rules, and the rules are intended for fair trial, but you won't obey them.

Go ahead.

\* \* \*

(2469) (The jury thereupon retired from the courtroom at 5:18 o'clock p.m.)

The Court: I might suggest that the young child be kept out of the courtroom. If conversations are distracting, and I see some of the jurors turning toward him.

Mr. Edelman: Leave the older one, here, please.

\* \* \*

(2472) Well, after this happened, the brain was paralyzed beyond its strength to consciousness or unconsciousness. Then after that he begins to bleed, according to Mr. Newmark himself. There is a tremendous amount of loss of blood. He was virtually bleeding to death. He probably would have been in much worse shape if he hadn't

*Colloquy*

struggled onto that truck and got to the doctor to stop it, the massive hemorrhages that were coming out of his face—

Mr. Sergi: Your Honor, I can appreciate what he is saying but there is no proof of that.

The Court: Objection sustained. There is no proof of that.

\* \* \*

(2489) Then take the man's brain. Take a brain that is destroyed and ripped and torn, and what is that worth? Do you say fifty thousand dollars is too much?

Mr. Sergi: Your Honor, I am fascinated, but I must object. "Ripped and torn." Where did the doctor ever say that this was ripped and torn and destroyed, where?

The Court: The jury may think that it is a form of hyperbole and that they have heard the testimony, and I will allow it as in the general term of fair comment.

\* \* \*

(2566) (The following occurred in the absence of the jury.)

\* \* \*

The Court: You have it. It's on Mr. Edelman's desk. Incidentally, when you talk to your clients, tell them that each time they walk into the courtroom with the children, it's when the jury walks in, it's an obvious play for sympathy and I might say something if that continues.

Mr. Orseck: No.

The Court: I don't think it's right. Now, I don't know why—don't these kids go to school?

Mr. Orseck: No.

The Court: Why aren't they in school today?

Mr. Orseck: One does and one doesn't.

The Court: I don't want to keep them out of (2567) the Court but I think it's ridiculous.



*Colloquy*

Each time the jury walks in they come through the courtroom door.

Mr. Orseck: They think they are obliged to.

The Court: Obligated to? Come on.

Mr. Fetell: We didn't want to sound petulent.

Mr. Orseck: I shall tell them.

The Court: The kids stayed away all during the trial. They came in for the summation and charge. I don't know what they learned from it. I insist—

Mr. Orseck: Is that off the record?

The Court: No.

I insist this is going to be a fair trial and if this keeps up I'm going to tell the jury that these young children are being marched through that door solely for the purpose of sympathy. If you want that, I'll do it.

Mr. Orseck: No.

I'll keep them out.

\* \* \*

**Second Deposition of David Utegg, Taken at Scranton,  
Penna.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Moses Taylor Hospital

Room 244

2:20 o'clock P. M.

November 24, 1974

Examination Before Trial of David Utegg, a witness herein, taken pursuant to an Order of the Court, at the Moses Taylor Hospital, 700 Quincey Avenue, Scranton, Pennsylvania, before Robert Hantman, a Certified Shorthand Reporter and Notary Public in and for the State of New York.

(2) Appearances:

Sidney Orseck, Esq., Attorney for Plaintiffs, Route 52 East, Liberty, New York 12754 By: Edelman, Berger, Peters and Koshel, Esqs., 16 Court Street, Brooklyn, New York, By: Jerome Edelman, Esq., of Counsel.

John J. Langan, Esq., Attorney for Maggiolo Corporations, 175 Remsen Street, Brooklyn, New York By: Sergi and Fetell, Esqs., 44 Court Street, Brooklyn New York, By: Benjamin J. Sergi, Esq., of Counsel.

Present:

Sidney Orseck, Esq.

Lester Fetell, Esq.

David Utegg, the witness.

Margaret Utegg, his wife.

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IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that all rights provided by the C.P.L.R., including the right to object to any question, except as to the form, or to move to strike any testimony at this examination, is reserved, and in addition, the failure to object (2a) to any question, or to move to strike testimony at this examination, shall not be a bar or waiver to make such motion at, and is reserved for, the trial of this action.

IT IS FURTHER STIPULATED AND AGREED that this examination may be sworn to, by the witness being examined, before a notary public other than the notary public before whom this examination was begun, but the failure to do so, or to return the original of this examination to counsel, shall not be deemed waiver of the rights provided by Rule 3116 of the C.P.L.R., and shall be controlled thereby.

IT IS FURTHER STIPULATED AND AGREED that the filing and certification of the original of this examination is waived.

IT IS FURTHER STIPULATED AND AGREED that counsel for the defendants shall furnish to counsel for the plaintiffs a copy of this examination without charge.

(3) DAVID UTEGG, a witness, having been first duly sworn, was examined and testified as follows:

Mr. Sergi: Will you note, please, that this deposition is pursuant to an Order of Judge Michler of the Eastern District Court of New York.

*Examination by Mr. Edelman:*

Q. Mr. Utegg, this examination is pursuant to order of Judge Michler because the defendants or the attor-

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neys for the defendants have stated that you wish to change your testimony given under oath in an examination held on July 11, 1974. I'm going to ask you certain questions in this regard. Firstly, do you remember being examined under oath on July 11, 1974 in the United States District Court, Eastern District of New York where I asked you certain questions and Mr. Sergi asked you certain questions and Mr. Bernhard asked you certain questions? A. Yes, I do.

Mr. Sergi: That was on July 11, 1974?

Mr. Edelman: Correct.

(4) Q. Now, thereafter were you advised that your testimony, all the questions and answers given by you under oath at that time was transcribed and put in a book? A. Right; yes.

Q. And after that time is it correct that a copy of this testimony that you gave under oath on July 11, 1974 or the original of this testimony was sent to you to read and to correct; isn't that correct? A. Yes. My wife read it to me and signed it for me.

Q. Were all the answers given by you under oath on that date true? A. Yes.

Q. And if they were true then are they true now? A. Yes.

Q. Now, is there anything that you want to change to any of your answers in that Examination Before Trial? A. No.

Q. Now, is there anything you want to modify at all or change any of the answers you gave on July 11, 1974? A. No.

Q. By the way, how long have you been in this hospital which is the Moses Taylor Hospital in Scranton, Pa.

(5) A. I was admitted Wednesday.

Q. All right.



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Mr. Sergi: What was the date?

A. 20th of November, 1974.

Q. Did you have an operation in this hospital? A. Yes.

Q. And what operation was performed? A. They took the lens out of my eye, cataract operation on the left eye.

Q. When are you scheduled to be released? A. I have no idea. The doctor was just in before you gentlemen come in.

Q. Did you tell me on the telephone Friday, which was two days ago, that you were scheduled to be released on Monday, which is tomorrow? A. Yes, I did.

Q. Was that pursuant to what the doctor told you? A. Before I was admitted, when he scheduled me for surgery, he told me that I might be out Monday but right now he doesn't know.

Q. In any event, do you expect to be released either Monday or Tuesday from this hospital? (6) A. Yes, I do.

Q. And I notice that you are sitting here in Room 200 without patches over your eyes, only with glasses; is that correct? A. Right. They just took the patch off, just this afternoon. That's the first it's been off.

Mr. Edelman: That's it. You may examine.

*Examination by Mr. Sergi:*

Q. Mr. David Utegg, the fourth reason for our being here to take further testimony from you was a statement by Judge Miedler in that if it is found that any witness in this trial of Robert Elliot is lying, the matter will be turned over to the U. S. Attorney's Office for prosecution.

Mr. Edelman: First of all, I object. It's improper.

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Mr. Sergi: You made your statement. You made your statement. Don't say anything further and now I'm going to inquire.

Mr. Edelman: Just for the record, may I state that this is only an attempt to try to (7) intimidate this witness and, therefore, under these circumstances I object to any further statements on an attempt to intimidate this witness. It's wholly improper.

Mr. Sergi: I am not here to intimidate you, sir.

Q. Do you understand that, Mr. Utegg? I do not intend to intimidate you? A. Yes.

Q. Now, the last time you testified, Mr. Utegg, was July 11, 1974. Do you remember that? A. Yes.

Q. And that was down at the courthouse? A. Down in New York, yes.

Q. Who was present during the interrogation, do you remember? A. Ronny and Annie Gorr and Mr. Elliot and you -self, and there was another lawyer that sat alongside of you. I don't remember his name, and Mr. Edelman.

Q. All right. Now, while you were at the courthouse on that day prior to giving testimony, did you meet anyone else from Mr. Orseck's office? (8) A. No.

Q. How did you get down to the courthouse that day?

Mr. Edelman: I respectfully object to it. This has nothing to do with this inquiry. He stated before in his examination he came down with Mr. Maguire.

Mr. Sergi: Look, Mr. Edelman—

Mr. Fetell: You were told not to lead the witness by Judge Michler.

Mr. Sergi: Mr. Edelman, we were directed to come up here and take testimony and I distinctively understood Judge Michler to instruct you not to

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attempt to lead this witness to testify to anything except what he knows and what he is going to respond to questions and I respectfully direct you, Mr. Edelman, if you're going to make an objection, please state your objection, do not lead the witness, do not suggest answers to the witness, nor will I. If there are any objections that I will make I will say, "Objection" and no more. If there's any material we obtain here today that is not admissible or is (9) information that we obtained on a prior deposition, all objections may be made at the time of trial and the Court will decide whether they're applicable or whether they're not. Now, I say again, Mr. Edelman, please, let me conduct my examination. You may say, "Object" and please, refrain from saying anything further.

Mr. Edelman: May I for the record state that the only purpose of this inquiry is to find two things: Number one, whether or not Mr. Utegg wishes to change any of his testimony and Number two, what his present condition is at the present time, when he's going to be released. Certainly there is no order or direction whereby there is going to be a re-examination of any of the facts stated in the original examination.

Mr. Sergi: My understanding of Judge Michler's Order is that I may inquire of this witness anything that I expect to bring out in a courtroom which may impeach the testimony of this witness in the courtroom. I'm here now trying to lay a foundation for attacking that credibility where (10) I intend to bring in testimony that is contrary to the testimony he's going to give here. You made your statement, Mr. Edelman, I have given mine.

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Mr. Edelman: Please continue with the examination.

Mr. Sergi: Thank you.

By Mr. Sergi:

Q. I ask you again: Who is Mr. Maguire? A. He's the fellow that made contact with me that had anything to do with this case. He contacted me before I went to see Mr. Orseck.

Q. Do you know where he works or where he's from? A. He works for Mr. Orseck.

Q. Now, was he the gentleman that drove you down to the courthouse? A. Yes, from Liberty.

Q. From Liberty, New York. A. Right.

Q. You were taken to Liberty, New York? A. Yes.

Q. And from Liberty, New York, you were brought down to (11) the courthouse. A. Right.

Q. Was that the office of Mr. Orseck in Liberty, New York, where you met Mr. Maguire? A. No. We met at the diner.

Q. Now, when you got down to the courthouse in Brooklyn, New York, where you gave your testimony, did you meet Mr. Orseck? A. No.

Q. Did you ever tell anyone that you met Mr. Orseck in the courthouse in Brooklyn, New York before you gave your testimony? A. No.

Q. More specifically, did you ever tell your brother, Harold Utegg, that you met Mr. Orseck in the hallway in the courthouse in Brooklyn prior to giving testimony at the deposition? A. No.

Q. Did you ever tell your brother, Harold Utegg, that you met Mr. Orseck in the corridor or hallway of the courthouse in Brooklyn, New York prior to giving testimony and that he told you, "when you get in that (12) room to give testimony, tell them that you saw Elliot



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standing in the roadway on Glen Wild Road while you were driving your truck down Glen Wild Road that day"? A. No.

Q. How many times do you say you met Mr. Orseck at his office in Liberty, New York, prior to your coming to New York to give testimony? A. I was out there a couple different times but only once to discuss the case.

Q. How many times were you at his office? A. Three times.

Q. Now, you say you talked about the case one time. A. Right.

Q. What did you talk about on the other occasions? A. When I was out there with Brian DuBois and my brother Harold the second time, there was nothing said to me about the case. We just talked with Brian.

Q. Do you remember the first time you went to Mr. Orseck's office? A. Yes.

Q. How were you taken there? (13) A. My brother.

Q. Your brother Harold? A. Right.

Q. Now, on that occasion when you visited Mr. Orseck, was Mr. Orseck there? A. Yes; he come shortly after we got there.

Q. Did he speak to you that day? A. Yes.

Q. And did he speak to your brother Harold that day? A. Yes.

Q. Was there anybody else present in the room that day? A. Mr. Maguire was there for a while.

Q. Now, did Mr. Orseck speak to you on that first occasion? A. Pardon me?

Q. Did Mr. Orseck speak to you on that first occasion? A. Yes.

Q. What was that conversation about? A. Well, he seen when I come in, he seen that I couldn't see and he asked about my eye and we talked about my eye, how it happened and what was all wrong and things that—and then he talked to Harold most of the time.

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(14) Q. When he was talking to you about your eye on that first occasion, did Mr. Orseck suggest to you that he could make a compensation claim on your behalf? A. He asked if I took it to compensation and I said, "No". He asked if I was collecting compensation and I said, "No".

Q. Did he suggest to you that he would make a compensation claim on your behalf? A. No.

Mr. Fetell: For the record now, Mr. Orseck is shaking his head "no" and I've seen it and I'm saying now, for the record I ask Mr. Orseck not to make any more—

Mr. Edelman: That's nonsense.

(Off record discussion.)

Q. During the time that this conversation was taking place regarding whether you had a compensation claim or not between you and Mr. Orseck, was your brother Harold present? A. Yes, he was. He took me up the steps and back down the steps when we left the office. Harold was with me all the while.

(15) Q. Please, Mr. Utegg, just answer my questions. A. Okay. Okay.

Mr. Sergi: I didn't hear the last comment. ,

(Off record discussion.)

Q. My question was: During the time that the conversation took place between you and Mr. Orseck regarding your compensation claim, was your brother Harold in the room, same room? A. Yes. He was sitting on the right-hand side of me.

Q. Now, during that particular visit, did Mr. Orseck ask you anything regarding the alleged accident to Mr. Elliot? A. Not me personally, no.

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Q. Did he ask you any questions whether you were driving a truck for Maggiolo on April 24, 1972? A. Yes. He asked if I was a driver, yes.

Q. Did he ask you whether you were the driver of a driver? A. A driver.

Q. And did he ask you what kind of a truck you were driving? A. Yes.

(16) Q. And did he ask you whether on the 24th of April, 1972 you were driving down Glen Wild Road at any time? A. Yes.

Q. And did he also ask you whether you were carrying debris down Glen Wild Road on that day? A. Yes, he asked Harold. Harold did most of the answering that day.

Q. Please listen to me, Mr. Utegg. I am asking about the conversation now between Mr. Orseck and yourself. Leave Harold aside for the moment, okay? A. He didn't question me just personally, no.

Q. I'm asking you, Mr. Utegg, whether Mr. Orseck directed questions to you regarding whether you were driving a truck down Glen Wild Road on April 24, 1972?

Mr. Edelman: I object to it on the ground that he's already answered it. He said "Yes".

Mr. Sergi: In view of the last answer, I'm trying to clarify the answers now. His last answer was that the question was direct at both. I want to know whether he specifically was inquired of regarding this matter.

(Off record discussion.)

(17) Q. Now, I ask you again, Mr. Utegg: Please listen to me. Did Mr. Orseck speak to you directly while your brother was present?

Mr. Edelman: I object to it because he said he spoke to both of them.

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Mr. Sergi: You made your objection. And again, I asked you before, Mr. Edelman: Say "I object". Don't tell him what he said or what he should say, okay?

Mr. Edelman: All right. Ask your questions.

Q. Mr. David Utegg: During that first visit while your brother Harold was present, did Mr. Orseck direct any questions to you as to whether you were driving down Glen Wild Road on April 24, 1972? A. Yes, a few different questions, yes.

Q. Did he ask you whether you were driving a truck down that road that day? A. I don't remember personally, to be honest with you. He asked both of us. He was talking to both of us and sometimes I would answer and sometimes Harold would answer and I said "Yes, we drove down that road".

Q. Did you say "We drove down that road"? (18) A. Yes, because we all worked on the same job. We only worked one job at the time.

Q. Did you say that "I, Dave Utegg, drove down that road that day"?

Mr. Edelman: I object to it.

Mr. Sergi: You object and let him answer. Make your objection in the courtroom and the Judge can rule afterward.

Q. Dave Utegg, did you respond personally to any question put to you by Mr. Orseck at that time? A. Yes, when I was questioned personally, yes.

Q. And were you questioned personally at that time? A. A few different questions, yes.

Q. Now, were you asked on that occasion whether you personally were driving down Glen Wild Road on that day? A. Yes.



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Q. And were you asked on that day whether you were driving a Maggiolo truck on that road on that day? A. I didn't drive Maggiolo's truck, I drove Ronny Gorr's truck.

Q. You were working for Maggiolo, driving Ronny Gorr's (19) trucks; is that right? A. Yes.

Q. Were you asked whether on that day you were driving a Ronny Gorr truck working for Maggiolo down Glen Wild Road that day? A. Yes.

Q. Were you asked whether you were driving that truck with a load of debris down that road that day? A. Yes.

Q. Were you asked whether you were driving down that road with a load of debris in the morning on that day? A. Yes.

Q. When you were asked by Mrs. Orseck whether you were driving a Gorr truck operated by Maggiolo Corporation on that day carrying a load of debris on that truck down Glen Wild Road on the morning of that day, what was your response at that time? A. I don't get your question, sir.

Q. What did you answer? A. Well, lots of times, yes. He never personally—only a couple times did he point at me or Harold. A lot (20) of times Harold would start answers and I would answer both together.

Q. When you answered that question, did you say that you were driving that truck down Glen Wild Road with debris on the truck that morning? A. Yes.

Q. On that first occasion. A. Yes.

Q. In the presence of your brother Harold Utegg. A. Yes.

Q. Did you say on that first occasion that while you were driving down that road that morning you observed a man standing in the roadway at a catch basin with a rake in his hand while you were on your way to the

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dump? Did you say "Yes" to that on that first occasion? A. I don't believe the question was brought up that day, not that I remember.

Q. Now, in your presence were questions asked of your brother Harold regarding his driving a truck for Maggiolo on that day? A. Pardon me?

(21) Q. Do you understand that question? If you don't understand the question, I will withdraw the question. During that very same visit your brother Harold Utegg was with you and you say he was sitting right next to you? A. He was sitting, well, about the same distance we are I'd say.

Q. Was Mr. Orseck asking questions of your brother Harold Utegg also? A. Yes. We both give answers.

Q. While you were there was Mr. Orseck asking questions of Harold Utegg as to whether he was driving down that road with a Gorr truck in the employ of Maggiolo? A. He never personally asked any questions like that, no. He asked both of us questions together like I pointed out before.

Q. Did you overhear your brother Harold Utegg's response to that question or those questions that were posed as you say to both of you? Yes or no? Did you overhear? A. I don't remember, no.

Q. You don't remember what he said, then. A. No; I don't remember him asking personally, no. He (22) never brought the question up twice. If he asked a question he asked it once. He didn't ask it 10 or 15 times the same question.

Q. At that time on that first visit, was any question asked of you or Harold or both of you by Mr. Orseck as to whether you saw Robert Elliot get a load of gravel from the demolition site? A. Yes, we saw him get a load of gravel.

Q. Was that your answer to the question? Please. A. He didn't ask the question.

*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. He did not ask that question at the time A. No.

Q. Were you in the room at all times that Harold was there? A. Yes.

Q. Did you overhear whether Mr. Orseck asked your brother as to whether your brother saw Robert Elliot at the job site on the day of this accident? A. Yes, he asked if Harold had seen him and he said "Yes".

Q. And did Harold respond to Mr. Orseck's question that he saw Elliot at the job site at 11:55 A. M. on that (23) day? A. I don't believe the time was brought up, no.

Q. I'm asking you specifically a question now and I want either a "yes" or "no" answer or if you don't remember, just say so: Did your brother Harold say that Robert Elliot was at the demolition site picking up a load of gravel at 11:55 A. M.? A. I don't remember so, no.

Q. In your presence did Mr. Orseck ask your brother Harold if anything had fallen off his truck on April 24, 1972? A. No.

Q. He did not ask? A. He didn't ask if anything fell off our truck, no.

Q. In your presence did your brother Harold respond that nothing had fallen off his truck? Do you remember that or did it not take place? A. I don't remember that, no.

Q. Did Mr. Orseck ask your brother Harold if he was carrying lumber or junk or debris on his truck on the day that this supposed to have happened? A. Yes, I think so.

(24) Q. Do you remember that your brother Harold answered that he was not carrying debris, lumber or junk on his truck that day? A. No.

Q. No, he did not answer that? A. Well, he didn't ask—he asked if we was hauling on that road, I think.

Q. You remember my question.

*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Mr. Edelman: Wait a moment.  
(Off record discussion.)

(25) Q. Did your brother answer, "No," to that question that he asked of you both? A. No.

Q. "No," what? No, he did not ask it? A. He didn't ask it, no.

Q. Did your brother Harold answer "No", he was not carrying that stuff that day on that road? A. No.

Q. He did not. A. No.

Q. Okay. Did you tell Mr. Orseck on that first occasion that you were not carrying lumber and debris on your truck on Glen Wild Road that morning? A. No.

Q. No, you did not. A. No.

Q. Okay. Did you say to Mr. Orseck that you had not been driving on Glen Wild Road on that day? A. No.

Q. Did you visit again a second time around July 2, 1974 at Mr. Orseck's office? A. I don't remember the date but I was out there a different (26) time.

Q. Were you at the office of Mr. Orseck on another occasion when your brother Harold was present, Brian DuBois was present and your wife Margaret was present? A. Yes.

Q. And, by the way, this is your wife Margaret seated here today; is that correct? A. Right.

Q. Now, on that occasion, did Mr. Orseck speak to Mr. DuBois? A. Yes.

Q. And did he speak to Mr. DuBois in your presence? A. Yes.

Q. And did you hear the conversation between Mr. Orseck and Mr. DuBois on that occasion? A. The biggest part of it, yes.

Q. And did Mr. Orseck discuss Mr. Elliot's accident with Mr. DuBois? A. Yes.

(Discussion off the record.)



*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. Did Mr. DuBois tell Mr. Orseck in your presence that the first he had heard about any accident to Mr. Elliot (27) was when a Mr. Slater came to the demolition site and asked whether they knew anything about a Mr. Elliot? A. Yes.

Q. Were you present and did you overhear Mr. DuBois state to Mr. Orseck that on the morning of this accident all of you were hauling sand and gravel and did not haul any debris and lumber? Did you hear him say that? A. No.

Q. Did you hear him say that on that morning none of the trucks made any trips down Glen Wild Road to the town dump? A. No.

Q. While you were there at Mr. Orseck's office, were any photographs shown to you or to your brother or to Mr. DuBois? A. They saw pictures of the trucks, yes.

Q. Did you see pictures of the trucks? A. I couldn't see nothing then; I couldn't see them.

Q. How did you know that they were being shown pictures of the trucks? A. Well, they were talking.

(28) Q. What were they saying? A. They said, "I drove this truck and Dave drove that truck," and questions like that, answers like that.

Q. Were you present during the entire conversation that was taking place between Mr. Orseck and Mr. DuBois, yourself and Harold on that second occasion? A. I never left the office. I sat in the office all the while.

Q. And they also sat in the office during the entire period of time; is that correct? A. No; they went through the building. Mr. Orseck showed them their building.

Q. During the conversations you were all in one room? A. Yes, biggest part, yes.

Q. And during the entire conversation you were present and you overheard all of the conversations. A. Yes.

*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. And you knew when Mr. Orseck was speaking; is that right? A. Yes.

Q. And you knew when Mr. DuBois was speaking; is that correct? (29) A. Right.

Q. Even though you couldn't see them; is that correct? A. Right.

Q. During that visit did you ever hear Mr. Orseck tell Mr. DuBois that he would have to change his story in order to help Mr. Elliot? A. No.

Q. Did you hear Mr. DuBois say more than once that, "The truth is, we never drove down that road that day"? A. Not that I remember, no.

(Discussion off the record.)

Q. Did you hear DuBois on that visit, second visit to Mr. Orseck's office, say to Mr. Orseck that on April 24, 1972 all of the Maggiolo trucks were taking sand to another area and were not down Glen Wild Road? A. No.

Q. Did you hear, on that visit, Mr. Orseck say to Mr. DuBois, "You've got to help Elliot in this case"? A. No.

Q. On that occasion did you hear Mr. Orseck ask DuBois to go with him to the place where this accident was supposed to have happened? (30) A. I think he asked him that, yes.

Q. Did you hear Mr. Orseck ask your brother Harold to go to the place where this accident happened? A. Yes.

Q. Did you hear your brother Harold on that occasion tell Mr. Orseck that Elliot had been injured when he was struck by a tree branch? A. No.

Q. Did you hear Mr. Orseck say to Mr. DuBois, "You're full of shit"? A. No, not that I remember.

Q. Did you hear Mr. Orseck say to Mr. DuBois, "I'll beat the shit out of you"? A. No.

*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. Did you hear Mr. Orseck say, "You've got to help Elliot at any cost"? A. No.

Q. On that occasion did Mr. Orseck also speak to your brother Harold in your presence? That's on the second visit. A. Oh, yes.

Q. And did he at that time again ask your brother whether (31) he drove a Maggiolo truck on April 24, 1972 down Glen Wild Road? A. Yes.

Q. And did your brother Harold reply that he did not drive a Maggiolo truck down Glen Wild Road on April 24, 1972? A. No.

Q. Did your brother Harold on that occasion say to Mr. Orseck that on the morning of April 24, 1972, "We were hauling sand and gravel to a place away from Glen Wild Road"? A. Not that I remember, no.

Q. On that occasion did Mr. Orseck speak to you in the presence of Harold DuBeis and your wife, Margaret? A. I didn't answer, I don't think, any questions that day.

Q. Did he ask you any questions on the second visit regarding whether you were driving a Maggiolo truck down the Glen Wild Road on the morning of April 24, 1974? A. Yes.

Q. Did you tell him that you were not driving a Maggiolo truck down Glen Wild Road on the morning of (32) April 24, 1972? A. No.

Q. Did you tell him that on that morning you were driving a Maggiolo truck hauling sand and gravel somewhere else? A. No.

Q. On that occasion did you tell Mr. Orseck that you were driving down Glen Wild Road on April 24, 1972 during the morning? A. Yes.

Q. Did you tell him on that occasion that you were driving down Glen Wild Road on the morning of April 24, 1972 and you saw a man standing in the roadway cleaning out a catch basin? A. Yes.

*Second Deposition of David Utegg, Taken at Scranton, Penna.*

Q. Did you tell him that you were driving down that road on April 24, 1972, at about 11:30 A. M.? A. Yes.

Q. And all of this was in the presence of your brother, Harold Utegg. A. He was on that job, too, yes.

Q. That's not what I asked you. This discussion that you (33) just told us you were having on the second visit to Mr. Orseck's office, was Harold present during the entire conversation? A. I believe so, yes.

Q. Was your wife Margaret present during the entire conversation? A. Yes.

Q. During that second visit, did Mr. Orseck say to you that you would be called as a witness in the case of Robert Elliot? A. Yeah, I think so; yes.

Q. On that second visit, did Mr. Orseck say to your brother Harold Utegg that he would be called as a witness in the case of Robert Elliot? A. Yes.

Q. In your presence, did Mr. Orseck say to your brother Harold Utegg that he would not call him as a witness in the case of Robert Elliot? A. Not that I remember, no.

Q. How long did that second visit to Mr. Orseck's office last? A. I'd say about a half hour or so.

(34) Q. Did you all leave together after the second visit—you, your wife, Harold and DuBois? A. No.

Q. Did Harold and DuBois leave and you and your wife Margaret remain behind? A. Yes.

Q. After Harold and DuBois left, did Mr. Orseck continue discussing with you the accident of Robert Elliot? A. No.

Q. Was there any discussion after your brother Harold and Mr. DuBois left, between you and Mr. Orseck?

A. We talked about our kids, my wife. We just stood there chatting a few minutes, then we went home.

Q. On that second visit to Mr. Orseck's office, did Mr. Orseck again ask you whether you had made a compensation claim for your condition? A. No.



*Second Deposition of David Utegg, Taken at Scranton, Penna.*

Q. Did you visit Mr. Orseck's office a third time? A. I don't think so, no.

Q. Did you visit Mr. Orseck's office a third time with Harold and yourself? A. Not that I remember, no.

(35) Q. Did you visit the third time with you and your brother just prior to coming down to the deposition in Brooklyn, New York? A. No.

Q. Around July 6, 1974, which was 5 days before you came to the Court, Brooklyn, New York, did you with your brother Harold meet with Mr. Orseck at his office? A. Not that I remember, no.

Q. You remember that you did appear on July 11, 1974 at the courthouse. A. Yes.

Q. Did your brother Harold Utegg, on the evening before you went down to New York to testify to your deposition, call you? A. I don't think so, no.

Q. Did your brother Harold call you, on the evening before your deposition, call you and ask you what you were going to say at the deposition? A. No.

Q. Did you say to your brother the day before you went to the deposition on July 11th that you were going to go to the office of Mr. Orseck in Liberty, where (36) someone would drive you to New York City? A. No.

Q. Did your brother, on the evening before you went to New York, tell you during a telephone conversation that you should tell the truth during the deposition? A. No.

Q. Did you tell your brother, in a conversation the evening before you went to testify, that you had not been on Glen Wild Road on the morning of April 24, 1972? A. No.

Q. On the evening of July 11, 1974, the evening after you had testified at the deposition, did you have any conversation with your brother Harold? A. A couple minutes. He was out to my sister's; yes.

*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. Did your brother Harold ask you as to what you had testified to during the deposition in Brooklyn? A. He asked how things were down there, yes.

Q. Did you tell him, during a conversation, that you had said on the deposition that you were on Glen Wild Road and observed Elliot along the roadway on April 24, 1972? Did you tell him that's what you said during the deposition? (37) A. No, I don't think so. I don't think that was brought up.

Q. Did your brother Harold ask you why you did that when it was not the truth? A. No.

Q. Did you say to your brother Harold, during the conversation after your deposition, that Mr. Maguire from Orseck's office had driven you and your wife to the Court? A. Yes.

Q. Did you say to your brother, in the conversation after the deposition, that you were not going to testify, that you were on Glen Wild Road on the morning of April 24, 1972? A. No.

Q. Did you tell him that when you arrived at the courthouse and before you went into the deposition room, you were met by Mr. Orseck in the hallway of the courthouse and was told by Mr. Orseck to say: "Tell them that you were driving down Glen Wild Road on the morning of April 24, 1972 and that you saw Elliot standing in the roadway at a catch basin"? (38) A. No.

Q. Did you tell your brother that? A. No.

Q. Was that true or not true? A. True.

Mr. Edelman: I object to it.

Q. After the deposition, in that conversation with your brother, did you tell your brother that it was not true that you were driving a truck down Glen Wild Road the morning of April 24, 1972? A. No.

*Second Deposition of David Utegg, Taken at Scranton, Penna.*

Q. Now, since July 11, 1974—that was the date we had the deposition—have you been in contact with Mr. Elliot or has Mr. Elliot been in contact with you? A. No.

Q. Since July 11, 1974 have you been in contact, in discussion, in conversation, telephone calls or any way whatsoever, with Mr. Edelman? A. No.

Q. Since July 11,— A. Wait a minute; yes. The other day here in the hospital.

(39) Q. Is that by telephone? A. Yes, by telephone.

Q. Prior to that day, since July 11, 1974, was there any conversation between you and Mr. Edelman? A. No.

Q. Now, between July 11, 1974 and today, has there been any communication or conversation or writing of any kind between yourself and Mr. Orseck? A. No.

Mr. Edelman: With the exception, I suppose, again, of that telephone conversation in Court the other day.

Q. I'm excluding the telephone conversation the other day, understand that. A. No.

Q. Do you know whether there has been any communication, conversation or writing between Mr. Edelman and your wife Margaret? A. No.

Q. There has not been. A. Not that I know of, no.

Q. Do you know whether there's been any communication (40) between your wife and any of the attorneys, either of the attorneys, Mr. Edelman or Mr. Orseck? A. No.

Q. Do you know whether Mr. Elliot is here today? A. No.

Q. Prior to our meeting for this deposition, did you see Mr. Edelman and/or Mr. Orseck before we met you in your room today? A. I saw Mr. Orseck a couple seconds, that's all. No, I didn't see nobody else.

Q. When did you see Mr. Orseck a couple seconds? A. When they went to lunch.

*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. When you say "They," you mean Mr. Orseck and your wife? A. Mr. Orseck and my wife, yes. I was just getting lunch when they come and they left right away.

Q. And that was Mr. Orseck and your wife. A. Right.

Q. Do you know whether Mr. Elliot was here also at that time? A. No.

Q. After that deposition of July 11, 1974 you say you met your brother at your sister's house. (41) A. No, I didn't meet him, no.

Q. Where did that conversation take place that we were talking about a moment ago? A. Harold was at my sister's house, I was at my home.

Q. Were you at your sister's house? A. No.

Q. Did he call you on the telephone? A. Yes.

Q. On that particular occasion when he called you on the telephone, did you tell him that you would like to change your telephone? A. No.

Q. Did you speak to your brother on another occasion after that phone call that you just mentioned when he was at your sister's house, did you speak to him again on another occasion, either by phone or in person? A. I talked to him once when he was at my brother's.

Q. And were you present at your brother's or was this another telephone conversation? A. This is at my brother's, right next door to where I live.

(42) Q. Were you in your brother's house or was your brother Harold in your house? A. He wasn't at neither one. I wasn't at his house or he wasn't at mine. See, there's four of us brothers live together. Harold lives about 22 miles away from me and he was in there with a load of sand.

Q. You have another brother? A. I have 6 brothers.

Q. Now, I want to know where you met your brother Harold on this next occasion you're talking about. A. In front of my brother Harry's.



*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. In front of your brother Harry's house. A. Right.

Q. Is your brother Harry's house next door to you?  
A. 100 feet between us.

Q. Was that on the street, in your brother's house or your house where the conversation took place? A. I was standing on the lawn, front yard.

Q. And there was a conversation between you and Harold? A. Yeah, we were talking.

Q. And were you talking about your testimony? A. No.

(43) Q. Was there any conversation about your testimony? A. No.

Q. Did you tell your brother at that time that you wanted to recant or change your testimony that you had given on the deposition? A. No.

Q. Did you have any other contact with your brother by phone or person, writing or otherwise, after that second occasion? A. No.

Q. At any time after that, at any time up to the present time, did you ever tell your brother Harold Utegg that you wanted to change your testimony and that you wanted to recant? A. No.

Q. At any time did you tell your brother that your testimony that you gave during the deposition was not true? A. No.

(Discussion off the record.)

Q. Have you been promised any consideration by Mr. Orseck for the testimony that you've given on behalf of (44) Mr. Elliot? A. No.

Q. By the way, who's paying your hospital bill here? A. I hope the union. I don't know who's going to pay it. That's the least of my worries. All's I'm worrying about is my eyesight. I'm not worrying about nothing.

*Second Deposition of David Utegg, Taken at Scranton,  
Penna.*

Q. Now, at the beginning of this deposition here, Mr. Edelman asked you whether your doctor told you you'd be discharged Monday or Tuesday. Do you remember that? A. Yes.

Q. Now, in a subpoena that was given to you to appear on behalf of the plaintiff, you came down to Brooklyn, New York. A. Yes.

Q. You came down voluntarily, did you not? A. Right.

Q. Now, if I give you a subpoena now and you're out of the hospital Tuesday, will you come down to Brooklyn, New York if I pay your expenses and supply the transportation? A. It's up to my doctor.

(45) Q. If your doctor says it's all right, will you come down? A. If my doctor says yes—I asked him this morning how long before I can travel and he says he don't want me going no place.

Q. If your doctor says it's all right, will you come down to Brooklyn, New York if I supply you with the transportation?

Mr. Edelman: He already said "yes."

A. If I feel okay, sure.

Q. I didn't ask you that. I'll say it again. A. What are you beating around the bush. I said "Yes" as long as I'm in good health and I feel okay, I'll go anyplace. I'm not afraid. Don't ask me 50 times the same question, one question.

Q. I'm trying not to. A. You're starting to shake me up, Buddy. My eye is starting to bother me.

Q. All right, Mr. Utegg. Here is a subpoena and we'll give you \$20.00, and I have no more questions. I've given you \$20.00 as a fee.

*Harold Utegg, Direct*

Mr. Edelman: All done?

(46) Mr. Sergi: Yes.

(Examination concluded at 4:10 o'clock P. M.)

DAVID UTEGG

Subscribed and sworn to  
before me this      day of      , 19      .

Certified to be a true and accurate transcript of the  
testimony as given by the witness.

ROBERT HANTMAN  
Certified Shorthand Reporter

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(2080) HAROLD UTEGG, called as a witness, having  
been first duly sworn by the Clerk of the Court, took  
the witness stand and testified as follows:

*Direct Examination by Mr. Sergi:*

Q. Mr. Utegg, what is your occupation? A. Truck-  
driver.

Q. In order to conserve time, were you a truckdriver  
in the employ of Maggiolo during the Urban Renewal  
job in Woodridge, New York, on or about April 24, 1972?  
A. Yes, sir.

Q. At that time, the other drivers were your brother  
Dave, David Utegg? A. Yes.

Q. Brian DuBois and Milo Conklin? A. Yes, sir.

Q. And the foreman of the job was Mr. Diago? A.  
Right.

Q. And the laborer was Mr. Alvin Banner? A. Yes,  
sir.

Q. Have I named everybody? A. Yes, sir.

Q. I think perhaps I left out—was there a bulldozer  
operator? A. Right.

*Harold Utegg, Direct*

(2080a) Q. What was his name? A. Harold DeGrote.

(2081) *Direct Examination by Mr. Sergi (Cont'd):*

Q. Okay.

Now, do you recall what work was being done by yourself and the other truck drivers on the morning—on the morning of April 24, 1972? A. Yes, sir. It was taking sand and gravel in the foundation from—I forget what street it is, up to the laundry.

Q. What do you remember? A. Steam laundry.

Q. Mr. Harold Utegg, what do you remember April 24, 1972, as the—that's what you were doing? A. Well, that's when it was going up there and the guy come down, Mr. Slater, said that a fellow had got hurt.

Q. Okay.

Is that why you remember that day? A. Remember that day, that's right.

Q. It's not necessarily April 24th, whatever, but that was the day somebody came down and told you Mr. Elliot was hurt? A. That's right.

Q. Now, how long did you continue carrying the (2082) sand, the gravel, foundation over to the area of the laundry that day? A. Oh, around 1:30. A quarter to 2:00.

Q. Pardon? A. 1:30, a quarter to 2:00.

Q. Now, at any time that day were you down Glenwild Road going to the village dump? A. No, sir.

Q. Didn't go down there at all? A. That's right.

Q. Was there any demolition done that afternoon at all? A. In the afternoon, yes.

Q. What time in the afternoon was there demolition? A. Maybe a quarter after 3:00.

Q. Now, when they—when the building was being demolished, did you take any of this stuff down Glenwild Road in the afternoon around 3:00 o'clock? A. Yes, sir, took one load.



*Harold Utegg, Direct*

Q. One load. Is that the only load? A. That's right.

Q. Now, did you see your brother David Utegg that afternoon? A. Yes, sir.

(2083) Q. And did you see whether he took any loads of debris down Glenwild Road that afternoon? A. He took one load also.

Q. One load.

Did you see your brother David during the day between 8:00 o'clock in the morning until 2:00 in the afternoon?

Did you see your brother David around driving his truck? A. Yes, sir.

Q. What kind of work did you see your brother doing from 8:00 o'clock in the morning until about 2:00 in the afternoon? A. Same thing I was doing.

Q. Same thing you were doing? A. Yes, sir.

Q. Now, when was the first time that anyone spoke to you about this accident after April 24, '72? A. Pardon?

Q. When for the first time did anyone ask you about what happened on April 24, '72? Anybody ask you about this accident? A. Oh.

Q. Just take it easy. Answer the questions the (2084) best way you can. If you don't understand my questions, Mr. Utegg, I will change them so you can answer them, so you can understand them. A. The first they ask anything about is when Mr. Orseck, I think, called me up.

Q. Okay.

Was that the first time? A. The first time, I think.

Mr. Sergi: Excuse me.

Q. Do you remember about what time of—when that was?

Do you remember when that was, the first time? A. That May.

Q. Pardon? A. I think it was in May.

Mr. Edelman: Your Honor, may I have the year, please?

*Harold Utegg, Direct*

Q. What year was that? A. '70—no. This year.

Q. '74? A. '74.

Q. And how was that contact made? By telephone, by letter? A. Well, Mr. Maguire called me up and asked me if (2085) I'd come out to his office.

Q. Call you on the telephone? A. Right.

Q. And did he ask you to bring anyone with you? A. Yes. Bring my brother.

Q. Bring your brother David? A. Right.

Q. Now, do you and your brother David live together?

A. No, sir.

Q. How far apart are you? A. 25 miles.

Q. And he lived in Pennsylvania; is that correct, and you live in New York State? A. Right. Yes, sir.

Q. And did you contact your brother David? A. Right away.

Q. And did you bring him to Mr. Orseck's office on that first time? A. Yes, sir.

Q. When I say first time, there was more than one occasion; is that correct? A. Right.

Q. On that very first occasion, who was in Mr. Orseck's office? (2086) A. It was Mr. Orseck, myself and Dave and Maguire.

Q. Maquire. And what was that conversation all about on that particular visit? A. It was mostly on Dave's eye, where he had the operation, who operated on it and—

Q. Dave had had an operation to his eye? A. Yes, sir.

Q. Which eye? A. His right eye.

Q. And did your brother David have any vision that day when you went to Mr. Orseck's office? A. Very little. Blurry.

Q. And you say there was conversation about David's eye? A. Yes.

Q. Well, between whom was the conversation? Who was talking to whom? A. Mr. Orseck was talking to David.

*Harold Utegg, Direct*

Q. And did you overhear the conversation? A. Yes, sir.

Q. You tell this Court and Jury what that conversation was about. A. Well, we went in the office and he asked Dave (2087) how he was. He asked him what happened to his eye. And Dave told him.

Q. What did David tell him about his eye? A. Well, he couldn't see. He went down to Florida, had it operated on and he had that gas and stuff pumped in his eye and a few days later, he could see light.

Q. Did Mr. Orseck ask your brother David how that came about, his eye problem? A. Well, I don't know right offhand if he told him how it happened but the blood vessel broke.

Q. What other conversation, if anything, was there between Mr. Orseck and your brother regarding his eyes? A. Well, Mr. Orseck asked him if he got any compensation out of it and David said no. So he said, he'll take the case.

Q. Who said he'll take the case? A. Mr. Orseck.

Q. He'll take the case of David? A. That's right, in the conversation.

Q. Okay.

Q. What else was said after? Anything else? A. No. Then he went back talking about the doctors on his eyeball.

(2088) Q. Okay. Was there any conversation with you that day? A. Very little.

Q. Very little. Was that the extent of the conversation on the first visit? A. Yes, sir.

Q. Did you go back again? A. Yes, sir.

Q. When did you go back the second time? A. Offhand, I don't know what the date was or the day.

Q. Was it in this year, of 1974? A. Yes, this year.

Q. About how much later was it after the first visit, a week, a month? A. I'd say a week.

*Harold Utegg, Direct*

Q. A week later. And how were you asked to come back that second week? A. Telephone call.

Q. The same way? Mr. Maguire called you? A. Yes, sir.

Q. Were you given any instructions about your brother David at that time? A. He told me that his wife is bringing him out, (2089) so I went and he said that Brian Dubois was going to be there, so I picked up Brian and we went out together.

Q. Now, David's wife is Margaret; is that correct? A. Pardon?

Q. David's wife is Margaret? A. Margaret, yes.

Q. When you got to Mr. Orseck's office, did you see your brother David and his wife Margaret? A. Yes, sir.

Q. Who else was there? A. Mr. Orseck and Mr. Maguire.

Q. Now, between whom was the conversation on this second visit? A. Most to Brian.

Q. That's DuBois? A. Yes, sir.

Q. Brian DuBois and whom? A. Well, we was all in the office together.

Q. So Mr. Orseck was talking to Mr. DuBois, Brian DuBois? A. On Mr. Elliott's case, yes.

Q. Okay.

Mr. Edelman: Pardon me, your Honor, may we have a side-bar conference? It will only take one second.

(2090) The Court: The Jury may be excused.

(Jury excused.)

Mr. Edelman: I just want to register my objection for protection purposes for this testimony and the previous testimony given regarding the conversations at Mr. Orseck's office.

The Court: Why can't you make an objection and state the ground if you want to make no argument on it? Why do I have to excuse the Jury to just hear objection to the conversation?



*Harold Utegg, Direct*

Mr. Edelman: Well, I thought—well, the—I should have done it, your Honor.

The Court: What's—on what ground?

Mr. Edelman: On the same grounds, it's collateral under the Sonato case, and under the other case I gave you including the Romney case.

I just wanted to protect the record.

The Court: Seat the Jury.

Mr. Edelman: That's all there was.

(Jury present.)

Mr. Edelman: Your Honor, may I have the witness excused? Mr. DuBois?

The Court: No. He's already testified. He may remain in the Courtroom.

(2090a) By Mr. Sergi:

Q. Will you tell this Court and Jury what the conversation was that you—

(2091) *Direct Examination by Mr. Sergi (Cont.):*

The Court: Wait.

Mr. Sergi: I beg your pardon.

The Court: Of course, there is nothing wrong in a lawyer investigating a case and interviewing prospective witnesses to determine what they know about the accident.

And the conversation that Mr. Orseck had with this witness or Mr. DuBois or anybody else would normally not come into a case, wouldn't come into this case. It's only on the charge by the defendant that Mr. Orseck attempted to falsify testimony that I'm permitting it to come in.

Now, whether you credit this witness' testimony and whether you believe the charge is a matter solely for you.

*Harold Utlegg, Direct*

Now, of course, if you feel that Mr. Orseck did nothing more than confer with prospective witnesses, these and others—and I don't care how many—that's the duty of a lawyer—if you find that the testimony showed nothing more than just disregard it.

But if the defendant has proved to you that (2092) there was a conscious effort to pressure witnesses into changing their story with the expectation that they would give false testimony, then you may infer from such a finding, if you make it, that the plaintiff's case was either weak or that he knew he had no case and that he—this was an effort to either supply evidence to support a false case or to supply evidence that would strengthen a weak case.

That's the only purpose of it. We are not interested in how Mr. Orseck prepares a case, how he investigates and it's none of your business, none of my business. It's only when it reaches the level where someone—and the conduct of the lawyer is attributable to the plaintiff—attempts to bring false testimony into the courtroom, in a trial.

And even though the attempt isn't successful, if the defendant proves that the attempt was made to obtain false testimony, then you may draw the inferences I suggested. Otherwise, forget about it.

Mr. Edelman: Respectfully object.

The Court: All right. Go ahead.

By Mr. Sergi:

Q. Mr. Harold Utlegg, did you overhear the conversation—the conversations between Mr. Orseck and Mr. Brian (2093) DuBois? A. Yes, sir.

Q. Will you tell us what that conversation was? A. I've asked him if he was down that road, Glenwild Road, that

*Harold Utegg, Direct*

morning. He said, no. In fact, he asked all three of us if we was down that road. He said no.

Q. When you say all three of us— A. That was Brian DuBois, myself and my brother.

Q. And you say you heard Brian say no, he was not down Glenwild Road that day? A. That is right.

Q. And you answered no, you were not down Glenwild Road that day? A. Yes, sir.

Q. And did you hear what your brother Dave said to that question? A. He said—

Q. What did your brother Dave say to that question? A. He said the same thing. We wasn't down the road that morning.

Q. That he was not down that road that morning? A. Yes, sir.

Q. Go ahead. What else did you overhear? A. And he says—he asked how come he wasn't down (2094) that road. So I know one thing—went to another and he says "You hear about Mr. Elliott?" And he said, "Yes."

So at ten minutes to 12:00, I—I was there when Mr. Elliott got loaded with gravel. I don't think—I know, Brian wasn't there and neither was my brother. But Milo Conklin was there. And there was lunchtime, about 20 after 12:00, Mr. Slater come down, asked Brian if he—if we was in a fight with Mr. Elliott.

And he says, "No."

He says, "Well," he says, "you don't look it." So he left. And we sat there talking. How did he get hurt, you know, because we wasn't on that road to see him get hurt.

Q. Was that the conversation—is that what you were telling Mr. Orseck in the office? A. Right.

Q. Okay. Go ahead. A. All went through the same way. So he showed us this place and—

Q. Say that again. A. He showed us his office up there.

Q. He, you mean Mr. Orseck? A. Mr. Orseck, right.

*Harold Utegg, Direct*

Q. Yes? A. And he told Brian to shut up a few times when (2095) he was telling the truth. And Mr. Orseck says, "You don't—you don't remember the time of when he got hurt or anything?"

So after we got done looking at his place over, Mr. Orseck took me out in another room and says that we don't need Brian no more because he's—he's no good for the case.

He says, "If you will come," he says, "I'll call you."

So we went back in the room and then Brian and I left and after that I don't know what happened.

Q. Now, was there any other discussion or any other conversation between Mr. Orseck and Mr. Brian DuBois? A. Oh, yes.

Q. Tell us about it, please. A. Well, we was upstairs. Before we went upstairs, he said he had to go and—to the bank and—about his mortgage. And Mr. Orseck went out of the room and Brian says, "About that chicken coop"—

Mr. Edelman: Pardon me, your Honor, I object to anything—Mr. Orseck is out of the room—any conversation between Brian and him.

Q. Don't tell us about any conversation if Mr. Orseck was not there. A. He wasn't quite out of the room. Wait until I finish. He was no more in the doorway when Brian says, (2096) "This chicken coop." He spun right around and he came back.

Mr. Edelman: Pardon—all right.

Q. Yes. Go ahead. A. All right.

Then after a while we were all out, Brian and I and Mr. Orseck, Margaret; Dave couldn't go because he couldn't see anyway, right. So Mr. McGuire and Margaret went—showed her around and we went upstairs, looked around his whole place. And upstairs he had a told of Brian's arm.



*Harold Utlegg, Direct*

Q. Who he had— A. Mr. Orseck, sorry.

Q. You saw that? A. Yes, sir.

Q. And was anything said at that time? A. Well, he had him away, he says, "You know I could break your arm very easily." He was an ex-cop.

Q. Who is that? A. Mr. Orseck.

Q. Is that what you heard him say? A. Yes, sir.

Q. You and Brian left.

Did you ever come back to Mr. Orseck's office? A. I did.

Q. And on that occasion, who was present? (2097) A. Just Dave and I, Mr. Orseck.

Q. How did Dave get there, do you know? A. Pardon?

Q. How did Dave get there for the visit? Did you pick him up? A. Right.

Q. What was the conversation that day? A. Went out there and he says, "Well, we'll have to go to the city to testify."

Q. Who was—who is talking now? A. Mr. Orseck.

Q. Who is he speaking to? A. Dave and I.

Q. Okay. A. So I says, "Why should I go because I know the truth, you know, that we wasn't on that road." I didn't have no reason to go down, down here to testify.

Q. Do you remember approximately when that was? A. Let's see. About two or three days later after the second visit.

Q. And did Mr. Orseck say anything to Dave during that visit? A. Yes. He says, "You'd be a good one to take down."

(2098) Q. At any time during those three visits did you ever hear your brother Dave ever say, in your presence, ever say to Mr. Orseck that he had been down that road?

Mr. Edelman: Respectfully object.

The Court: Objection sustained.

*Harold Utegg, Direct*

Q. Were you present when your brother David was asked whether he had been down Glenwild Road? A. Yes, sir.

The Court: I will not allow any statements by David Utegg unless the proper foundation has been laid and you know what that means, Mr. Sergi.

By Mr. Sergi:

Q. Now, were you brought down to court by Mr. Orseek or anybody at that time? A. No, sir.

Q. Do you know whether your brother was brought down to Mr. Orseek's—down to court that time? A. Yes, sir. David was.

Q. David. Now, did you have any conversation with your brother David before your brother David came down to court? A. No, sir, not after I took him home.

Q. And do you know whether your brother David did come down to court? (2099) A. Yes, I come down. Mr. McGuire brought him down, him and Margaret.

Mr. Edelman: I object to it unless he's talking about personal knowledge.

Q. Do you know—

The Court: Do you know that Mr. McGuire brought him down?

The Witness: Yes, because in that office Mr. Orseek told me, I heard it, that he would bring his wife down and David.

Q. And did you find out from Dave, your brother Dave, how he got down to Brooklyn, New York?

Mr. Edelman: Respectfully object to it, your Honor.

The Court: From his brother David?

Mr. Sergi: Pardon?

The Court: From his brother David?

*Harold Utegg, Direct*

Mr. Sergi: Yes.

The Court: Objection sustained.

(2100) *Direct Examination by Mr. Sergi: (Cont'd.)*

Q. When was the next time you have any conversations with your brother David? A. When he come back from New York. I called him up on the phone that night and asked him how everything went.

Q. Yes?

Mr. Edelman: I respectfully object to that conversation.

The Court: Objection sustained.

The Witness: Your Honor?

The Court: No, you can't testify to any conversations you had with your brother David.

The Witness: All right.

By Mr. Sergi:

Q. By the way, Harold Utegg, how long was your brother having trouble with his eye? A. How long?

Q. Yes. A. He's been having trouble a couple of years.

Q. On April 24, 1972, what was his eyesight then? A. He had one eye.

(2101) Q. He could only see out of one eye? A. That's right.

Q. And he was driving a truck with one eye? A. Yes.

Q. Did he tell that to— A. He didn't tell nobody.

Q. Did he tell that to Mr. Orseck in your presence?

A. No, sir. I don't think he did.

Q. Pardon? A. No.

The Court: Which eye did he have trouble with?

The Witness: The left eye he had a cataract.

The Court: A cataract on the left eye?

The Witness: Yes, sir.

*Harold Utegg, Direct*

The Court: Was that true on April 20, 1972?

The Witness: That was already there, yes, sir.

Q. Did you ever have any conversation with your brother David Utegg after he gave that testimony? A. Yes, sir.

Q. What did he tell you about it?

Mr. Edelman: I respectfully object.

The Court: Objection sustained. I will (2102) sustain any questions that relate to any conversation that this witness had with his brother. It's pure hearsay.

Mr. Sergi: I don't think we have to excuse the jury, your Honor. I just want to bring this to your attention, if I may.

(Handing document to the Court)

I ask whether I can ask those questions now.

The Court: No. That doesn't change my mind at all. I didn't buy that ruling in any way he eliminated the need for a foundation. I explained that to you on any number of situations.

Mr. Sergi: I have no further questions.

The Court: Mr. Edelman.

\* \* \*

(2566) (The following occurred in the absence of the jury.)

The Court: Talking about David Utegg second deposition.

Mr. Sergi: Yes.

Just before DuBois' testimony. If you have the volume with DuBois' testimony, it should be right in the beginning of it.

The Clerk: The 10th, your Honor.

The Court: The 10th?

The Clerk: Yes, your Honor.

The Court: You have it. It's on Mr. Edelman's desk. Incidentally, when you talk to your clients, tell them



*Colloquy*

that each time they walk into the courtroom with the children, it's when the jury walks in, it's an obvious play for sympathy and I might say something if that continues.

Mr. Orseck: No.

The Court: I don't think it's right. Now, I don't know why—don't these kids go to school?

Mr. Orseck: No.

The Court: Why aren't they in school today?

Mr. Orseck: One does and one doesn't.

The Court: I don't want to keep them out of (2567) the Court but I think it's ridiculous.

Each time the jury walks in they come through the courtroom door.

Mr. Orseck: They think they are obliged to.

The Court: Obligated to? Come on.

Mr. Feteli: We didn't want to sound petulant.

Mr. Orseck: I shall tell them.

The Court: The kids stayed away all during the trial. They came in for the summation and charge. I don't know what they learned from it. I insist—

Mr. Orseck: Is that off the record?

The Court: No.

I insist this is going to be a fair trial and if this keeps up I'm going to tell the jury that these young children are being marched through that door solely for the purpose of sympathy. If you want that, I'll do it.

Mr. Orseck: No.

I'll keep them out.

Services of three (3) copies of  
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of March, 1975

Dominic J. Carrella  
Attorney for Defendant  
Ronnie Farr

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of \_\_\_\_\_, 197

Eddison & Berger P.C.A. Lohs  
Attorney for  
by. Wendy Incentorens

3/11/75.